Petition

81-1382

No.

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In the
Supreme Court of the United States
October Term, 1981

JEFF ATKINSON,

Petitioner,

vs.

JANET ATKINSON
(a/k/a JANET GOELZ),

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is it a denial of a father's fundamental rights to due process and equal protection to give a mother an automatic preference in a custody case because the children are females?

2. Is it a denial of the father's fundamental rights to give custody of the children to the mother when: (a) the father has been primarily responsible for raising the children, (b) the father has had the closer relationship with the children, (c) the children wish to remain with their father, and (d) the father has more emotional warmth and better mental health than the mother?

3. Did the Illinois Supreme Court have adequate state grounds to refuse to deal with the federal constitutional issues raised by the custody decision because of an allegedly defective notice of appeal when that notice of appeal was promptly filed from the custody decision and when state statutes and court opinions suggest that the custody case was appealed in the proper manner, but a subsequent notice of appeal from the property decision did not restate that the custody decision would be appealed?

4. Did the Illinois Supreme Court deny the petitioner due process when it determined not to consider his federal constitutional claims by retroactively imposing a new procedural requirement that deprived him of a right to appeal?

5. Is it proper to award virtually all marital property to the wife when: (a) the husband paid for his wife's undergraduate, business school, and law school education, (b) the husband performed the majority of services as a homemaker, and (c) the husband, who had more assets than the wife, contributed 98.6% of all funds spent during the marriage?

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Decision of the Illinois Supreme Court

87 Ill. 2d 174
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GROUNDS ON WHICH JURISDICTION IS INVOKED

The Opinion of the Illinois Supreme Court was filed November 13, 1981. A Petition for Rehearing was filed November 20, 1981 and that petition was denied November 25, 1981. Jurisdiction is conferred by 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V;

United States Constitution, Amendment IX;

United States Constitution, Amendment XIV, §1;

Ill. Rev. Stat. ch. 40, §503;

Ill. Rev. Stat. ch. 40, §602;

Ill. Rev. Stat. ch. 40, §606(a);

Ill. Rev. Stat. ch. 110, §4;

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Ill. Rev. Stat. ch. 110A, §303(a);

Ill. Rev. Stat. ch. 110A, §304; and

Ill. Rev. Stat. ch. 110½, §11a-17.

The full text of these provisions are set forth in Appendix B, *infra*.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No.

JEFF ATKINSON,

Petitioner,

vs.

JANET ATKINSON
(a/k/a JANET GOELZ),

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Facts Pertaining to Custody Issues

Jeff and Janet Atkinson were divorced after 10 years of marriage. During the marriage, the Atkinsons had two children, Tara, now 11, and Abigail, now 9. (Report of Proceedings [hereinafter "R."], Oct. 20, at 14). While married, Jeff, 33, and Janet, 32, completed their undergraduate education, attended law school, and began practicing law with Chicago firms. (R., Oct. 20, at 19, 77).

Following their 1978 divorce hearing, a trial was held to determine the custody of Tara and Abigail. Jeff and Janet testified on their own behalf. Nine witnesses testified on behalf of the father. Two of Janet's friends testified about her mothering capability and her employer testified about her work schedule. The court also received psychological and psychiatric reports on the parties.

Louise Shief, the housekeeper employed by the Atkinsons at the time of both Tara's and Abby's birth, said that Jeff was the one who stayed home to take care of the children. "He was like the mother and the father at that time, because he was there most of the time." (R. Jan. 16, at 5). Mrs. Shief said Jeff fed the girls, bathed them, changed their diapers, played with them and took care of them when they were sick. (*Id.* at 6-7). The housekeeper said Janet "didn't have the intent to be home" and seldom stayed home when the children were sick. (*Id.* at 7-8). Mrs. Shief said when Janet was home, she usually stayed in her room and studied and that her involvement with the children was like "playing with dolls." (*Id.* at 6-11). Based on her observation of the family for over four years, Mrs. Shief said Tara and Abigail were closer to their father than their mother. (*Id.* at 10).

The Atkinsons' neighbors and babysitter also testified that Jeff served as both mother and father to the children, that he spent much more time with the children than Janet, and that he had a very warm and loving relationship with the children. (R., Oct. 30, at 37, 40, 42, 61-62, 66, 73, 84, 91-92, 96).

Two of Tara's elementary school teachers also testified on behalf of the father. Both teachers said that Jeff helped in the classroom and went on the children's field

trips. (*Id.* at 53-54, 77). Both described Jeff as a thoughtful, caring, interested parent (*Id.* at 54, 55, 77, 78), and both teachers testified that their primary parental contact was with Jeff and that they saw little of Janet (*Id.* at 53, 79, 81).

Jeff testified that, from the time Tara and Abby were born until the present, he, more than Janet, took care of raising the children. (R. Oct. 30 p.m., at 3, 9-10, 14-16). He also testified that he did most of the meal preparations, grocery shopping, household errands, and hiring of housekeepers, and that he took the children to most of their doctor visits. (*Id.* at 7, 16-18, 21-22).

Dr. Melvin Seglin, a board certified psychiatrist, reported that both Tara and Abigail said they wanted to live with their father (R. Jan. 16, at 16-17, 23-25, 49) that Jeff was sensitive, well-adjusted, in good control, (*id.* at 19, 38), and that Jeff was more stable than Janet (*id.*). Dr. Seglin concluded it would be in the children's best interest to be in their father's custody. (*Id.* at 29).

Two of Janet's friends testified on her behalf. Mary Ann Wexler, a former neighbor, said that Janet was a "terrific mother" with no deficiencies. (R., Oct. 20, at 109-10, 121). Carolyn Stock, a college friend, said Janet "is a very caring, nurturing, warm, and empathic, curdling mother" and that she is "(v)ery much a parent in conjunction with Jeff as a parent." (R., Oct. 30, at 4, 6, 12). Miss Stock said Jeff is an active father, but she believed Jeff was too involved with his children and didn't give them enough independence. (*Id.* at 8, 14).

Janet herself testified that she was a fit parent, that she loved her children, and that they loved her. (R., Oct. 20, at 80-81). Janet acknowledged that Jeff "is a good

father" and that "[h]e is genuinely interested in (the children's) education." (*Id.* at 100, 106). She said that she planned to continue working and would employ a housekeeper to take care of the children. (*Id.* at 78, 101-102).

During the trial, the court ordered that Jeff and Janet undergo an independent examination. (R., Oct. 30 p.m., at 34). As part of that examination, they were evaluated by Dr. Robert Traisman, a clinical psychologist, and Dr. Ner Littner, a psychiatrist. Dr. Traisman prepared written reports on Jeff and Janet and by stipulation of the parties, the reports were received into evidence. (R. Jan. 16, at 2-3).[1]

Dr. Traisman said Jeff has a great deal of emotional warmth, stability, spontaneity, and is strongly motivated to give his children a unified family setting. He did say Jeff has some unresolved dependency needs, but the doctor concluded:

> "[H]e certainly appears to have the ego integration and strength necessary to offer his children a stabilized, masculine father image as well as offering them appropriate amount of love, discipline, and encouragement for independent growth."

Dr. Traisman said Janet is "a very depressed and anxious woman who is markedly suspicious of the motives and intentions of other people." He said that although her problems may be due in part to marital stress, her problems were deeper and more longstanding than just marital stress. Dr. Traisman concluded:

> "She appears to be very interested in her children, and to have a genuine love for them, but at the same

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[1] Dr. Traisman's reports are reproduced in Appendix C *infra*.

> time there are many feelings of distrust about herself in dealing with the demands that children place upon parents. There is no real, strong indication that she would be a markedly unfit mother."

Dr. Littner recommended that the mother have custody of the children and that the father have rights of visitation. (R., Dec. 1, at 2, 18, 45). Dr. Littner said his approach to making custody recommendations is to determine if the mother is truly the mother, if the mother wants the children, and if she is capable of looking after them. If these criteria are met, Dr. Littner said he will recommend custody for the mother. (*Id.* at 26, 27, 39).

Dr. Littner said that Janet has more marked emotional problems than Jeff, but that she had "excellent," or at least "adequate," maternal capacity. (*Id.* at 10-11).

The psychiatrist testified that Jeff is an "exceptional" and "excellent father." (*Id.* at 30, 59-60). He added, however, that "Jeff has been trying not only to be a very good father, but he is also trying to be a mother to these children." (*Id.* at 11). Dr. Littner felt that Jeff's effort to be a "mother" was unhealthy. He said that because the children see their father serving in both the mother's and father's role, they would grow up being confused about what it is to be a man and what it is to be a woman. "[T]here is going to be some confusion in Tara's and Abigail's minds as to what their femininity truly is, and what it is to really be a mother," he said. (*Id.* at 24-25). On cross examination, Dr. Littner said he detected no confusion or harm to Tara and Abigail because of Jeff's "mothering" and fathering the children. (*Id.* at 25, 39, 53). Dr. Littner said the children were normal and had a good ability to express themselves. (*Id.* at 8-9).

In closing argument, James Friedman, the attorney for the children, said, "Dr. Littner did have a predisposition to favor mothers over fathers in custodial roles" (R. Jan. 25, at 33-34) and Mr. Friedman said he shared this prejudice.

In his summation, James Friedman said:

> "I come from the same prejudice, I think that my fellow counsels do hear and that most of the world at large does in terms of . . . thinking of roles and thinking of mothers taking care of children and fathers do the job.
>
> "Just because the law changes or just because these two try an experience of their own and become a new breed, the reality of roles is still out there in our society" (R., Jan. 25, at 33-34).

Dr. Seglin was called in rebuttal. He testified that Dr. Littner was applying a classical approach common 80 years ago when the roles of mother and father were clearly delineated. "The roles that were assigned in years past are no longer applicable," Dr. Seglin said. "There is an inchangeability of roles." (R., Jan. 16, at 30-31). Dr. Christel Lembke, a child psychiatrist, testified that mothers and fathers are equally capable of nuturing children. (R., Oct. 30, at 107). "[A] parent is a parent. And if he is a good parent, he can raise a child no matter what sex the child is." (*Id.* at 99-100). "One makes a great mistake generalizing mother-daughter or father-son." (*Id.* at 107-108). Dr. Lembke, who is also a neighbor of the Atkinsons, thought Jeff was an exceptionally good father. (*Id.* at 96).

Facts Pertaining to Property Issues

At the conclusion of the custody trial, the case was reassigned to Judge Charles Fleck, Presiding Judge of

the Domestic Relations Division. Judge Fleck heard the trial on property issues, the essential facts of which are not in dispute.

Jeff Atkinson was virtually the sole financial supporter to the marriage. Of all the money spent during the marriage, 98.6% of the money came from Jeff; 1.4% came from Janet. (R., March 15, at 8-9; Resp. Exh. 2). Jeff paid for all of Janet's undergraduate, business school, and law school expenses, except for one quarter of undergraduate work when Janet had a scholarship. (R., March 15, at 10-12; Resp. Exh. 3). He also paid $40,285.68 for housekeepers and child care. (R., March 15, at 12; Resp. Exh. 4). Jeff testified that, as between Janet and him, he performed the majority of services as a homemaker. (R., Oct. 30 p.m., at 3, 7, 9-10, 14-18, 21-22). The witnesses testifying on behalf of the father at the custody trial agreed that Jeff was the primary homemaker. See pages 2-3 *supra*. Janet denied this assertion. (R., Nov. 6, at 33-34).

The primary marital asset, the home, has an appreciated value of $140,000 and an equity of $85,000. (R., March 14, at 58-59; Pet. Exh. 13; Supplemental Judgment Order at 3). Jeff's assets, not including the home which was awarded to Janet, totaled $629,000.

During Janet's last semester of law school, she filed for divorce. After the judgment of dissolution of marriage was entered, Janet made a series of withdrawals from a joint checking account to which Jeff was the only contributor. The withdrawals were made despite protests from Jeff to Janet and from Jeff's lawyer to Janet's lawyer. (R., March 15, at 33, 37). The withdrawals totaled $5,567.71 and were for Janet's personal expenses, rather than for expenses for the children or home. The expenses for which she withdrew funds included

roundtrip airfares to see her boyfriend. (R., March 15, at 36, 58-59; Resp. Exh. 7).

Decision of the Trial Courts

Judge Porter made his ruling on custody of the children immediately after closing arguments. He did not discuss the law applicable to the case other than to say there were three factors he might consider, but none were conclusive: the amount of time each parent spent with the children; the desires of the children; and comments by doctors. (R., Jan. 25, at 39). The court did not make any findings of fact, although the judge said in passing that "both parents are very adequately and superior parents" (sic). (*Id.* at 38).

Before announcing his decision, Judge Porter commented, "I think in the final analysis judges as individuals are human beings . . . with all their personal prejudices, with all their personal feelings and experiences . . ." (R., Jan. 25, at 39-40). He then announced his decision:

> "[P]erhaps in this case if I was dealing with two young men, I don't know if the decision would be the same. We are dealing with two young ladies. I feel both parents are very good parents; however, I feel they should be in the custody of the mother." (*Id.* at 40-41).

This statement of the trial judge gives rise to the petitioner's constitutional claims.

The court's written order did not elaborate on the judge's oral statements. The written order stated: "Both parties are fit custodians" and concluded, "The best interest and welfare of the children will be served by awarding custody to their mother." (Copies of the judge's oral statement and written order are reproduced in Appendix A *infra.*)

Five months after Judge Porter entered his order on custody issues, Judge Fleck entered an order on property issues. He awarded Janet all marital property, with the exception of Jeff's $1,900 individual retirement account which he gave to Jeff. Jeff was ordered to quit claim his entire interest in the marital home to Janet. Janet was awarded temporary alimony (rehabilitative maintenance) and child support was set at $261 per week.

Notices of Appeal

At the time of the custody decision, there was no case law in Illinois on the issue of whether custody decisions were appealable when property issues were pending. There were, however, two statutes and case law which suggested that custody orders were immediately appealable. See pages 20-21 *infra*. Illinois Supreme Court Rule 303(a), Ill. Rev. Stat. ch. 110A, §303(a) requires that notices of appeal be filed within 30 days of judgment.

Nineteen days after entry of the custody order, attorneys for Jeff filed a notice of appeal from that order, stating that he would appeal the custody decision to the Appellate Court of Illinois. (Common Law Record [hereinafter "C."] at 24-25). When the property order was entered five months later, Jeff filed a timely notice of appeal from the property decision. (C. 47-50).

Decision of the Illinois Appellate Court

Eight and one-half months after the notice of appeal was filed from the custody order, Janet moved to dismiss the custody appeal for lack of an appealable order. The Illinois Appellate Court denied the motion and consolidated the custody and property appeals. The consolidation was ordered prior to completion of briefing and

before the appellate court took the case under advisement. In holding that both the custody and property appeal were properly before the court, the appellate court stated:

> "[W]e conclude that the interests of justice require that we consider the custody issue as well as the property issues. Jeff Atkinson was diligent in his efforts to perfect appeals as to both custody and property. There is no question but that Janet Atkinson had notice of his intent to appeal the custody issue, and she was less than prompt in her filing of the motion to dismiss the appeal from the custody issue. Under these circumstances, we conclude the custody judgment is reviewable."

82 Ill. App. 3d 617, 619, 402 N.E.2d 831, 832-33.

Jeff Atkinson's federal constitutional claims on custody issues were asserted in his opening brief to the Illinois Appellate Court and in all subsequent briefs to the appellate court and the Illinois Supreme Court.

The appellate court affirmed the trial court's award of custody to the mother. The court said that both Jeff and Janet were fit parents. 82 Ill. App. 3d at 625, 402 N.E.2d at 836. The appellate court said that the trial court's decision was not decided on the basis of sex, but it then went on to hold that it is proper to consider sex when deciding custody. *Id.* The court said the trial court's decision, including the judge's statement that the decision might be different if he were dealing with boys, did not "den[y] [Jeff Atkinson] due process and equal protection by discriminating on the basis of sex." *Id.*

The appellate court also affirmed the award of all marital property to Janet, noting that Jeff had more assets than Janet and that Janet had custody of the children. 82 Ill. App. 3d at 629, 402 N.E.2d at 839. In his opening

brief to the appellate court, Jeff challenged the property decision as an "abuse of discretion." In his petition for rehearing to the appellate court and in his briefs to the Illinois Supreme Court, he argued the property award was "sex discrimination" as well as an "abuse of discretion."

Decision of the Illinois Supreme Court

The Illinois Supreme Court did not address the custody issues presented by this case. Instead, The Supreme court dismissed the custody appeal because the notice of appeal from the property decision did not restate that the custody decision was being appealed. 87 Ill. 2d 174, 177-78, ... N.E.2d ....., ...

After dismissing the custody appeal, the supreme court affirmed the award of virtually all marital property to Janet, stating that she had custody of the children and that Jeff had more assets than her. 87 Ill. 2d at 180, ... N.E.2d at .....

REASONS FOR ALLOWANCE OF THE WRIT

This is a case "where gender, and not one's superior parenting ability, is determinative."

— Commentary on this case contained in *"Mothering" Husband Loses Custody Bid For Daughters —Might "Confuse" Kids*, 6 Family Law Reporter (BNA) 1089 (1980).

I.

GIVING AN AUTOMATIC PREFERENCE TO MOTHERS IN A CUSTODY DISPUTE PRESENTS IMPORTANT FEDERAL QUESTIONS THAT SHOULD BE SETTLED BY THIS COURT.

A. Giving an Automatic Preference to the Mother in Custody Proceedings Impacts on Fundamental Rights and Emotional Concerns of Every Parent and Child Involved in Such Proceedings.

The issue presented is whether it is permissible under principles of due process and equal protection to give a mother a preference in deciding child custody because of her sex or the sex of the children. Determination of child custody raises a two-faceted constitutional issue: first, because it involves the fundamental right to raise one's children and, second, because it presents the issue of whether it is permissible to treat people differently regarding a fundamental right because of sex.

To a parent, there are few matters in life as basic as the right to raise one's children. For children of divorce, it is vitally important that they be in the custody of the parent who can best raise them. At stake is the welfare and development of children as well as the happiness of children and their parents.

The best interests of a child in a custody dispute are not determined by sex, but rather by a careful examination of the individual facts of each case. When courts, such as the courts in this case, apply automatic presumptions and stereotypes based on sex, they are not serving the interests of children and they are denying parents their constitutional rights.

The issue of sex discrimination in deciding child custody is national in scope and it has been growing rapidly as an increasing number of fathers seek custody of their children upon divorce. Although fathers are equals as parents, they have not been getting equal treatment in the courts. The American Bar Association Committee on Child Custody estimates that men are given custody of their children in only 1 out of 10 contested cases. *Dad's Custody More a Crawl Than a Trend,* Chicago Tribune, April 13, 1980, §12, at 3.

The ability of fathers to obtain custody their children has not kept pace with the change of roles in society. In the last 20 years, the percent of mothers who work outside the home has doubled. Today, 58% of mothers with children under 18 and 43% of mothers with preschoolers work outside the home.[2] As mothers have become more involved in the work force, fathers have become more involved as parents.

The ability to parent is not unique to women, yet many courts, including the courts in this case, persist in the belief that a woman is inherently better able to raise chil-

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[2] U.S. Dept. of Labor, Bureau of Labor Statistics, *News Release No. 81-522* (Released Nov. 15, 1981), *compared with* U.S. Dept. of Labor, Bureau of Labor Statistics, *1960 Report No. 13, Marital and Family Characteristics,* at A-13.

dren than a man. Psychiatric and pediatric studies have shown otherwise. See pages 17-18 *infra*.

The issues of equal rights in child custody cases and the ability of fathers to raise children is a matter of substantial national interest. *See, e.g., Fathers Lose Progress in Custody Race — Tender Years Doctrine,* Los Angeles Times, April 24, 1980, Part 1-A, at 6-7; *Odds Still Against Dads in Most Custody Cases,* Santa Ana Register, May 4, 1980, at A-13; *A New Kind of Life With Father,* Newsweek Magazine, Nov. 30, 1981, at 93-98; *Now Men's Lib,* NBC News Magazine, broadcast Oct. 30, 1981, 8 p.m. E.D.T.

The facts of this case provide an excellent background for dealing with these issues. For example, there is detailed testimony that the father had been primarily responsible for raising the children while the mother was preoccupied with matters outside the home. Moreover, three psychiatrists dealt expressly in their testimony with the issue of fathers being able to raise children. See pages 5, 6 *supra*.

Because of the fundamental importance of the constitutional issues, the national scope of the problems, and the factual background with which this case presents the issues, we ask this Court grant the Petition for Writ of Certiorari.

B. Giving an Automatic Preference to the Mother Because of Sex is at Issue.

In the course of this appeal, the mother has tried to avoid the issue of sex by saying that presumptions in favor of mothers are "not at issue." (Mother's Brief to the Ill. Sup. Ct. at 46). An examination of the statements of the trial judge and the decision of the appellate

court show otherwise. The sole reason the trial judge gave for his decision was: "We are dealing with two young ladies. I feel both parents are very good parents; however, I feel they should be in the custody of the mother." (R., Jan. 25, at 40-41). That statement was immediately proceeded by the judge's comment that "perhaps in this case if I was dealing with two young men, I don't know if the decision would be the same." (*Id.* at 40). The decision at the trial level came down to a gut feeling by the trial judge that mothers should raise girls. The Illinois Appellate Court affirmed that decision and held that it is proper to consider sex in a custody dispute. 82 Ill. App. 3d at 625, 402 N.E.2d at 836.

The Family Law Reporter analyzed the appellate court decision in this case and succinctly stated the crux of this case. The Family Law Reporter said this is a case "where gender, and not one's superior parenting ability, is determinative." 6 Fam. L. Rep. (BNA) 1089 (1980).

Echoing the view of the Family Law Reporter, the Chicago Daily Law Bulletin reviewed the appellate court's decision and said, "It appears that even though the Tender Years Doctrine was found inappropriate in today's modern world, this court has precipitated a revitalization of that dogma." Chi. Daily L. Bull., May 23, 1980, at 1, col. 5. Contrary to the denials of the mother, presumptions based on sex are very much at issue.

C. Giving an Automatic Preference Based on Sex in a Custody Proceeding Violates Due Process and Equal Protection.

Each parent has a fundamental right to the custody and management of his or her children. These rights obviously conflict in a custody proceeding, yet they do not

simply disappear. Rather, they must be fully considered in light of the best interests of the child determined by the facts of each case. To give an automatic preference whenever children are female is to automatically deprive fathers of their fundamental rights.

Although this Court has never ruled on the issue of maternal preferences in child custody cases arising out of divorce, principles declared by this Court in related areas strongly suggest that giving preferences based on sex violates due process and equal protection. In *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 652, 95 S.Ct. 1225, 1235, 43 L.Ed.2d 514, 527 (1975), dealing with Social Security survivors benefits, this Court stated: "[A] father, no less than a mother, has a constitutionally protected right to the . . . 'custody and management' of 'the children he has sired and raised.'"

The fundamental nature of the right to custody of one's children was recognized in *Stanley* v. *Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212-13, 31 L.Ed.2d 551, 558-59 (1972) (holding that unmarried fathers could not be deprived of custody of his children upon the death of the mother without a hearing):

> "It is plain that the interest of a parent in the companionship, care, custody and management of his of her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'
>
> "The Court has frequently emphasized the importance of the family. The rights to conceive and raise one's children have been deemed 'essential,' 'basic civil rights of man', and '[r]ights far more precious . . . than property rights . . .' The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal

Protection Clause of the Fourteenth Amendment, and the Ninth Amendment." (citations omitted).

Because of the fundamental importance of child custody, the use of sex in making custody determinations must withstand strict scrutiny. *Reed* v. *Reed*, 404 U.S. 71, 75, 92 S.Ct. 251, 253, 30 L.Ed.2d 225, 229 (1971); *Frontiero* v. *Richardson*, 411 U.S. 677, 682-83, 93 S.Ct. 1764, 1768, 36 L.Ed.2d 583, 589 (1973). Giving a preference to a parent on the basis of sex does not withstand strict scrutiny because utilization of sex is not a reliable, much less a foolproof, method for determining what is in the best interest of children. *State ex rel. Watts* v. *Watts*, 77 Misc. 2d 178, 183, 350 N.Y.S.2d 285, 290-91 (Fam. Ct. 1973.) *See also In re the Marriage of Tresnak*, 297 N.W. 2d 109, 112-13 (Iowa Sup. Ct. 1980).

Even if a standard less stringent than strict scrutiny were applied, maternal preferences are still unconstitutional. Favoring one parent over another because of sex is not "substantially related" to "important government objectives." *Craig* v. *Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 457, 50 L.Ed.2d 397, 407 (1976). The important governmental objective of determining the best interest of a child is not served by applying stereotypes based on sex, but rather by a careful examination of the facts of each case.

Although some courts have been slow to regard fathers and mothers equally as parents, the pediatric and psychiatric professions have not. Dr. Mary C. Howell, a professor of pediatrics at Harvard Medical School, herself a mother of six, states: "It should be noted immediately that many or most of the essential aspects of 'mothering' might better be considered aspects of 'parenting.' . . . We should therefore remember that the child care

usually performed by mothers might be just as well carried out by fathers." Howell, *Employed Mothers and Their Families,* 52 Pediatrics 252, 258 (1973).

The District of Columbia Court of Appeals sitting *en banc* overruled its prior cases giving mother an automatic preference and in doing so made a review of medical literature. The court concluded: "Eminent child psychiatrists have demonstrated that what a child needs is not a mother, but someone who can provide 'mothering.' . . . And the ability of a person to provide 'mothering' does not necessarily correspond to the gender of the parent or the biological relationship between adult and child." *Bazemore* v. *Davis,* 394 A.2d 1377, 1381 (D. C. Ct. App. 1978) (*en banc*). *See also* page 6 *supra; Caban* v. *Mohammed,* 441 U.S. 380, 389, 99 S.Ct. 1760, 1766, 60 L.Ed.2d 297, 305 (1979) ("maternal and paternal roles are not invariably different in importance"); J. Goldstein, A. Freud & A. Solnit, *Beyond the Best Interests of the Child* at 19, 51, 98 (1973); *Developments in the Law — The Constitution and the Family,* 93 Harv. L. Rev. 1156, 1333-38 & n. 159 (1980). The decision of the lower courts, based on the sex of the mother and children, violates due process and equal protection.

D. The Award of Virtually All Marital Property to the Wife was Improper.

The property decisions of the courts below are before this Court for two reasons. First, the award of the marital home is closely related to the custody decision. If custody of Tara and Abigail is returned to the father, he wishes to live in the home with his children.

Second, the award of virtually all marital property to the wife was sex discrimination. *Cf. Orr.* v. *Orr,* 440 U.S.

268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979). To illustrate the discriminatory nature of the award, simply reverse Jeff's and Janet's positions. If a woman came into a marriage with more money than her husband, put her husband through undergraduate school, business school and law school, and at the same time took care of the home and children, worked herself and financed the marriage, she certainly would not be deprived of virtually all the marital property when, during her husband's last semester of law school, he filed for divorce, raided the checking account to pay for his personal expenses and trips to see his girl friend, and finally asked for and got alimony. Janet Atkinson should not receive more property than a man would receive.

II.

THE ILLINOIS SUPREME COURT'S REFUSAL TO CONSIDER THE CONSTITUTIONAL ISSUES DEPRIVED THE PETITIONER OF DUE PROCESS.

The Illinois Supreme Court was asked in this case to overrule 133 years of Illinois case law which declared that mothers would always be preferred in custody cases.[3] The court, nonetheless, after having the case on its docket for 1 1/2 years, dismissed the custody appeal. 87 Ill. 2d

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[3] *See, e.g., Miner* v. *Miner,* 11 Ill. 43, 49-50 (1849) (holding "an infant of tender years is generally left with the mother . . . even when the father is without blame, merely because of his inability to bestow upon it that tender care which nature requires, and which is the peculiar province of a mother to supply"); *Nye* v. *Nye,* 411 Ill. 408, 414, 105 N.E.2d 300, 303 (1952) (holding "the maternal affection is more active and better adapted to the care of the child . . . Therefore, compelling evidence must be presented, proving the mother to be an unfit person, to cause the custody of her minor daughter to be denied her").

174, 177-78, ... N.E.2d ....., ... In doing so, the Illinois Supreme Court effectively ruled that, because two pieces of paper (the notices of appeal) were filed separately instead of being stapled together, it would decline to reach the substantial federal constitutional issues. To avoid those issues, the court elevated form over substance to an extreme, made a new rule and applied it retroactively, and acted contrary to its own standards for construing notices of appeal.

A notice of appeal from the custody decision was promptly filed after the custody order was entered. At the time the notice of appeal was filed, it appeared the custody order was being appealed in the proper manner. There were three separate bases for taking immediate appeal of the custody decision, even though property issues remained to be settled.

First, under the recently enacted Illinois Marriage and Dissolution of Marriage Act, which had been in effect less than five months, it was declared to be state policy to give expedited consideration to cases involving child custody. Ill. Rev. Stat. ch. 40, §606(a). Consistent with that policy, the lives of children should not be held in limbo while property disputes wind slowly to completion. *Cf. Ridge* v. *Ridge*, 1 Ill. App. 2d 226, 117 N.E.2d 310 (2d Dist. 1954) (holding that temporary custody orders are immediately appealable).

Second, under Illinois law, orders that are punishable by contempt are immedately appealable even if other issues remain open and even if there is no express finding that there is no just reason to delay enforcement or appeal. "[E]nforceability by necessary implication carries with it the right of appeal." *Micelli* v. *Micelli*, 45 Ill. App. 2d 159, 165, 195 N.E.2d 233, 236 (1st Dist. 1963)

(holding that an award of alimony was appealable even though other issues were pending). *See also People* v. *Ealy*, 49 Ill. App. 3d 922, 936-37, 365 N.E.2d 149, 159 (1st Dist. 1977); *In re the Estate of Sherwood*, 56 Ill. App. 2d 334, 340-41, 206 N.E.2d 304, 307-08 (1st Dist. 1965). In this case, if the father had tried to retain custody of the children, he certainly would have been subject to contempt, and that enforceability carries with it the right to appeal.

Third, Illinois Supreme Court Rule 304(b)(1), Ill. Rev. Stat. ch. 110A, §304(b)(1) provides that orders are immediately appealable if they are "entered in . . . [a] guardianship, conservatorship, or similar proceeding which finally determines a right or status of a party." Here, the order in question was entered during what was, in effect, a guardianship proceeding or a proceeding very similar to those involving guardianships. Under Illinois law, the guardian of a child, like a parent who obtains custody upon divorce, "shall have custody of the ward . . . and shall make provision for [his] support, care, comfort, health, education and maintenance." Ill. Rev. Stat. ch. 110 ½, §11a-17. Whether the guardianship or custodianship of a child is determined during a divorce proceeding or a probate proceeding, if an error is made in choosing the person to whom a child's care is entrusted, that decision should be reviewed on appeal as soon as possible, even if property issues are pending.

Given the three reasons for believing the custody order was immediately appealable and the absence of any case law saying that custody decisions were not appealable, the attorneys for the father proceeded with the custody appeal after giving notice to the court and opposing side.

When the Illinois Supreme Court ruled that the custody decision was not appealable, it was applying a new rule retroactively, thereby depriving the father of any right of appeal. The court's action violated due process. "[T]he judgment of the Supreme Court . . . must be reversed, because it has denied to the [petitioner] due process of law — using that term in its primary sense of an opportunity to be heard and to defend its substantive right." *Binkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 678, 50 S.Ct. 451, 453, 74 L.Ed. 1107, 1112 (1930).

"Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *N.A.A.C.P.* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 457-58, 78 S.Ct. 1163, 1169, 2 L.Ed.2d 1488, 1497 (1958). *See also Bouie* v. *City of Columbia*, 378 U.S. 347, 354, 84 S.Ct. 1697, 1703, 12 L.Ed.2d 894, 900 (1964).

In addition to applying a new rule on custody appeals retroactively, the Illinois Supreme Court also set aside more than 40 years of its own precedent that notices of appeal are to be liberally construed and that courts of appeal have jurisdiction as long as deficiencies are of form only and do not prejudice the appellee. As recently as 1979, the Illinois Supreme Court said:

> "Courts in this State and the Federal courts have repeatedly held that a notice of appeal will confer jurisdiction on an appellate court if the notice, when considered as a whole, fairly and adequately sets out the judgment complained of and the relief sought so that the successful party is advised of the nature of the appeal. Unless the appellee is prejudiced thereby,

> the absence of strict technical compliance with the form of the notice is not fatal, and where the deficiency in the notice is one of form only, and not of substance, the appellate court is not deprived of jurisdiction." (citations omitted)

Burtell v. *First Charter Service Corp.*, 76 Ill. 2d 427, 433-34, 394 N.E.2d 380, 382-83 (1979) (holding that a notice of appeal from one judgment would be considered to confer jurisdiction to hear the appeal of a second related judgment). *See also Echols* v. *Olsen*, 63 Ill. 2d 270, 274-75, 347 N.E.2d 720, 721-22 (1976); *People ex rel. Pickerill* v. *New York Central Railroad Co.*, 391 Ill. 377, 380, 63 N.E.2d 405, 407 (1945); *National Bank of the Republic* v. *Kaspar American State Bank*, 369 Ill. 34, 39-40, 15 N.E.2d 721, 723 (1938); Ill. Rev. Stat. ch. 110A, §2(a) and Ill. Rev. Stat. ch. 110, §4 (directing that rules of appellate procedure be liberally construed for the purpose of determining the *substantive* rights of the parties) (emphasis supplied).

In this case, the deficiency in notice of appeal, if any, was of form only. If the two notices of appeal had been stapled together rather than filing the custody appeal first and the property appeal second, the Illinois Supreme Court under its new standard, would have to hear the custody appeal. The fact that the appeals were filed separately prejudiced no one. As the appellate court noted, "There is no question but that Janet Atkinson had notice of his intent to appeal the custody issue." 82 Ill. App. 3d at 619, 402 N.E.2d at 832.[4] The court was

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[4] "[T]he state appellate court's willingness to reach the merits of the petitioner's federal claims provides convincing proof that the judgment does not rest on adequate state grounds." *Wardius* v. *State of Oregon*, 412 U.S. 470, 477 n. 10, 93 S.Ct. 2208, 2213 n. 10, 37 L.Ed.2d 82, 89 n. 10 (1973).

not harmed by multiple litigation since the appeals were consolidated by the appellate court prior to completion of briefing and before the court took the case under advisement. Indeed, the fact that there were two appeals is the result of the Illinois trial court's decision to give the parties two separate trials with two different judges.

The supreme court's manner of construing the notice of appeal in this case fell far short of its own expressed standards, which require the court to be "liberal" and "consider [the notice] as a whole." *Burtell* v. *First Charter Service Corp.*, 76 Ill. 2d at 433-34, 394 N.E.2d at 382-83. The court's inconsistent application of its standards for construing notices of appeal also is a denial of due process. "We have often pointed out that procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review." *Barr* v. *City of Columbia*, 378 U.S. 146, 149, 84 S.Ct. 1734, 1736, 12 L.Ed.2d 766, 769 (1964). *See also Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 233-34, 90 S.Ct. 400, 402-03, 24 L.Ed.2d 386, 390-91 (1969). Finally, because the time for appeal under this new ruling has long passed, the Illinois Supreme Court has forever precluded the petitioner from taking an appeal from the custody decision.

III.

THE ILLINOIS SUPREME COURT DID NOT HAVE ADEQUATE STATE GROUNDS TO REFUSE TO DEAL WITH THE CONSTITUTIONAL ISSUES.

Even if we assume for the purpose of argument that the Illinois Supreme Court's refusal to rule on the constitutional issues did not descend to a violation of due process, the court still did not have adequate state grounds to dismiss the custody appeal.

A state cannot place unreasonable obstacles in a petitioner's attempt to vindicate federal rights. There is a paramount federal interest in making certain that federal rights are not destroyed by state procedural rules. "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis* v. *Wechsler*, 263 U.S. 22, 24, 44 S.Ct. 13, 14, 68 L.Ed. 143, 145 (1923). *See also Henry* v. *Mississippi*, 379 U.S. 443, 449, 85 S.Ct. 564, 568, 13 L.Ed. 2d 408, 413-14 (1965).

In this case, the federal issues were plainly and reasonably presented. A notice of appeal was promptly filed from the custody decision and the issues were raised in the opening brief to the appellate court and in all subsequent briefs. The supreme court's refusal to deal with the constitutional issues because two pieces of paper were not stapled together is to "force resort to an arid ritual of meaningless form." *Staub* v. *City of Baxley*, 355 U.S. 313, 320, 78 S.Ct. 277, 281, 2 L.Ed.2d 302, 310 (1958). *See also N.A.A.C.P.* v. *Alabama ex rel. Flowers*, 377 U.S. 288, 297, 84 S.Ct. 1302, 1309, 12 L.Ed.2d 325, 332-33 (1964) ("The Alabama courts have not heretofor applied their rules . . . with the pointless severity shown here"); *Rogers* v. *State of Alabama*, 192 U.S. 226, 230-31, 24 S.Ct. 257, 258-59, 48 L.Ed. 417, 418-19 (1904).

A leading commentator on practice before this Court has stated:

> "The Supreme Court should undertake to insure that in seeking to assert a federal right litigants are neither surprised by the creation of novel procedural doctrines, nor confounded by procedures so complex

> that ordinarily competent attorneys cannot secure determination of the right."

16 Wright, Miller, Cooper & Gressman, Federal Practice and Procedure §4027, at p. 737 (West 1977). The four attorneys who worked on preparing the petitioner's appeal to the appellate court believed the appeal was filed in the proper manner, and the full appellate court panel concurred that it had jurisdiction to hear the custody appeal. 82 Ill. App. 3d at 619, 402 N.E.2d at 832-33. Even the attorneys for the respondent apparently initially believed the custody appeal was filed in the proper manner since they did not file a motion to dismiss the appeal until 8 ½ months after they received the notice of appeal.

The Illinois Supreme Court made an unexpected and novel ruling on the manner in which custody cases could be appealed and then applied the rule retroactively. The court also departed from its own standards for construing notices of appeal. The constitutional issues had been fairly and reasonably raised and, therefore, the court did not have adequate state grounds to refuse to hear them.[5]

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[5] Among the types of relief this Court could provide would be to grant the Petition for Writ of Certiorari and remand the case to the Supreme Court of Illinois for consideration of the federal constitutional issues. Rather than remand the case, we ask that this Court grant the Petition for Writ of Certiorari for a plenary review because of the national scope and importance of the issues and because it would be in the best interests of Tara and Abigail Atkinson for this case to be concluded by this Court as soon as possible.

CONCLUSION

This case presents one of the most important issues facing courts and families today — the criteria for deciding child custody. The quality and depth of the relationship between father and child and mother and child is not subject to a litmus test based on sex. The decision of this Court will affect not only the welfare of Tara and Abigail Atkinson, but also the welfare of the hundreds of thousands of families nationwide that are involved in divorces each year.

We ask that this Court grant the Petition for Writ of Certiorari for a plenary review of this case.

Respectfully submitted,

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Of Counsel:
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Dated: January 26, 1982

Appendix

APPENDIX A

ORAL STATEMENTS AND DECISIONS OF THE COURTS BELOW

A. Oral Statement Made in Announcing the Custody Decision by Trial Judge Albert Porter of the Circuit Court of Cook County, Illinois.

The Court: I first want to thank the attorneys on this case. I don't know what else could be done by either side.

I think that it's been handled in a very professional manner. I think that all of the evidence as much evidence went to support the particular positions which have been brought before the court and deciding custody cases, needless to say, is probably one of the most difficult decision that a judge can have to make.

I used to think that a bench trial murder case was difficult in resolving the issues but it's no more difficult than a custody case.

I think that one of the problems that we all suffer from in deciding custody cases is that the penalties of the parents always some way come into play. The feelings of the parents, the disappointment that you know the parents are going to experience upon the decision of the court along with, I think the trauma that the children might go through in living with the decision.

In this case it's particularly difficult because both parents are very adequately and superior parents. There is no question that Mrs. Atkinson will be a beautiful mother. There is no question that Mr. Atkinson will be a beautiful father.

I think that somehow when the Judge is about to award custody, the feeling trickles as is now that that parent can no longer function in the capacity in which that

parent has been functioning or should function in totality, that is not true.

I think what happens is that hurt is injected but there is no reason in the world that both parents can't continue to function in the manner and in the role that that parent is suppose to function.

Now, if that happens, these children are going to be hurt less than if the parent took it personally and for some reason withdraw the parent conflict and the feeling that they have also a victory and there has been an undercutting of the children.

The court does not intend to do that. The court in all honesty wishes that there were no such decision to make, however, both sides is aware why this is thrusted upon the court to decide and it has to be decided.

The court has to determine what parent is to receive custody. Do you decide on the basis of how much time each parent has spent with the children. I think that perhaps that's a fact, that certainly is not conclusive.

Do you decide on the basis of what the child wants at the ages of five and seven, that's a factor and that should not be conclusive.

Do you decide on what the doctor says, that's a factor and yet that should not be conclusive.

I think in the final analysis judges as individuals are human beings, not in a vacuum with all their personal prejudices, with all their personal feelings and experiences and now when you have a case of this kind as Mr. Friedman has said you can almost flip a coin and you can almost feel that however the coin lands, one side is almost as good as the other.

However, the court has to try to base his ruling upon his experience, weight, all the testimony that the court has heard in the case, observe the parties involved, consider what you are dealing with and who you are dealing with and based upon that evidence come out with a deci-

sion, who knows whether it's the right decision or the wrong decision but you make it as best you can based on that criteria that you are giving the best interest of the children, not the feeling of the parents but the best interest of the children.

This is particularly a difficult decision to make in this case, perhaps in this case if I was dealing with two young men, I don't know if the decision would be the same.

We are dealing with two young ladies. I feel both parents are very good parents, however, I feel that they should be in the custody of the mother.

Visitation rights will be as liberal as can be worked out.

(R., Jan. 25, at 37-41).

B. Written Order on Custody Entered by Trial Judge Albert Porter of the Circuit Court of Cook County, Illinois.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, COUNTY DEPARTMENT, DOMESTIC RELATIONS DIVISION

JANET ATKINSON,

v.

JOHN ATKINSON,

No. 78 D 6551

ORDER

On the continued Petition of the parties relative to the permanent care and custody of the minor children Tara and Abigail Atkinson the court hearing testimony, considering exhibits and argument of counsel and being fully advised in the premises the court finds:

A. Both parties are fit custodians.

B. The best interest and welfare of the children will be served by awarding their custody to the mother with liberal visitation to the father. It is therefore ordered:

That custody of Tara and Abigail Atkinson is hereby awarded to Janet Atkinson and John Atkinson is awarded liberal visitation. The court reserves the question of specific visitation—child support, property division and assessment fees and costs. Further hearing on property, support and fees set for February 22, 1979 at 2:30 P.M.

Entered
January 25, 1979
Judge Albert S. Porter

(C. 23).

C. Oral Statement Made in Announcing the Property Decision by Trial Judge Charles Fleck of the Circuit Court of Cook County, Illinois.

The Court: In regard to the marital home, after hearing the testimony of the parties and making due consideration as to the question of custody and visitation, the respective marital property rights of the parties, the Court is going to award the marital home to Mrs. Atkinson and order and direct Mr. Atkinson to quit claim all his right, title and interest in and to that property by execution of an appropriate quit claim deed.

D. Written Order on Property Issues Entered by Trial Judge Charles Fleck of the Circuit Court of Cook County, Illinois.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT, DOMESTIC RELATIONS DIVISION

IN RE THE MARRIAGE OF
JANET R. ATKINSON,

Petitioner,

and

JOHN F. ATKINSON, a/k/a
JEFF F. ATKINSON,

Respondent.

No. 78 D 6551

SUPPLEMENTAL JUDGMENT ORDER DISTRIBUTING MARITAL ASSETS, SETTING CHILD SUPPORT AND MAINTENANCE, ETC.

. . .

II.

Petitioner is hereby awarded all right, title and interest in and to the marital home currently owned by the parties in joint tenancy and constituting marital property, said home being located at 733 Milburn Street, Evanston, Illinois, the legal description of which is annexed to this Supplemental Judgment and incorporated herein by reference. Respondent shall, within thirty (30) days of the date hereof quit-claim to the Petitioner, or to her nominee, any and all right, title and interest which he may have in and to said property. Upon such conveyance by Respondent to Petitioner, she shall become solely liable for the payment of all charges accruing as a result of the purchase of said home, and shall promptly pay and discharge the mortgage thereon in the manner, time and form required by the mortgagee, and shall save Respondent harmless of and from any

causes of action or liability thereon and will further indemnify Respondent against any loss on account thereof including court costs and attorneys' fees, it being the intention of the Court that the Petitioner shall assume sole and full responsibility and ownership of said marital home. Respondent shall assign to Petitioner all insurance policies relating to said marital home and such tax reserve or escrow fund as may be currently on deposit with the mortgagee and the Petitioner shall reimburse the Respondent in an amount equal to the prepaid insurance premium from the date of the entry of the Supplemental Judgment for Dissolution of Marriage to the end of the term policy. The Court finds that said home is presently valued by the parties at ONE HUNDRED FORTY THOUSAND DOLLARS ($140,000.00) and has an outstanding first mortgage encumbrance of approximately FIFTY-FIVE THOUSAND DOLLARS ($55,000.00). ((C. 98-100).

E. Decision of the Illinois Appellate Court.

APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT, FOURTH DIVISION

82 Ill.App.3d 617
37 Ill.Dec. 829
402 N.E.2d 831

Janet R. ATKINSON (a/k/a Janet Goelz), Petitioner-Appellee,

v.

John F. ATKINSON, a/k/a Jeff Atkinson), Respondent-Appellant.

Nos. 79-610, 79-1749.

March 20, 1980.

Rehearing Denied April 15, 1980.

JIGANTI, Justice:

The ten year marriage of Janet R. Atkinson (a/k/a Janet Goelz), the petitioner, and John F. Atkinson (a/k/a Jeff Atkinson, the respondent, was dissolved on October 5, 1978. The court subsequently conducted hearings on the question of custody of the parties' minor children, Tara and Abigail Atkinson, born in 1970 and 1972 and on the division of property. Custody was awarded to Janet Atkinson with rights of visitation to Jeff Atkinson. Janet Atkinson was also awarded certain property. Jeff Atkinson appeals from the awards of custody and property.

Preliminarily, Janet Atkinson questions the jurisdiction of this court to consider the custody judgment. That judgment was entered in January of 1979. A notice of appeal was filed within 30 days. Four months later, a judgment order distributing marital assets and setting child support and maintenance was entered. A notice of appeal from that judgment order was filed within 30 days. The latter notice of appeal did not mention the

custody judgment. In October of 1979—eight and a half months after the first notice of appeal was filed and two months after Jeff Atkinson filed his initial appellate brief—Janet Atkinson filed a motion to dismiss the notice of appeal from the custody judgment. On appeal, Janet Atkinson argues that because the custody judgment was not appealable, the first notice of appeal had no effect. She further contends that because the second notice of appeal did not include the custody judgment, that issue is not before this court.

[1] The lawsuit which is the subject of this appeal involves multiple claims including dissolution of the marriage, child custody and disposition of property. Under Supreme Court Rule 304(a) (Ill.Rev.Stat. 1977, ch. 110A, par. 304(a)), where multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to fewer than all of the claims only if the trial court has made an express written finding that there is no just reason for delaying enforcement or appeal. No such finding was made here. Therefore, although the custody order was a final judgment, it was not then appealable.

Nevertheless, we conclude that the interests of justice require that we consider the custody issue as well as the property issues. Jeff Atkinson was diligent in his efforts to perfect appeals as to both custody and property. There is no question but that Janet Atkinson had notice of his intent to appeal the custody issue, and she was less than prompt in her filing of the motion to dismiss the appeal from the custody issue. Under these circumstances, we conclude the custody judgment is reviewable. *See Burtell* v. *First Charter Service Corp.* (1979), 76 Ill.2d 427, 394 N.E.2d 380.

The parties are each attorneys and are employed by Chicago law firms. At the custody trial, the trial court heard testimony from 16 witnesses and received two written psychological reports.

Diane Bolash testified that she has known the Atkinsons since 1975 when she became their babysitter. She said Jeff Atkinson probably spends more time with the children but that Janet Atkinson also cares for them. According to Bolash, Janet Atkinson is an exceptional mother; both are good parents.

Louise Shief was employed until 1974 as a housekeeper by the parties. She was with the Atkinsons for more than four years including the time of the childen's births. She testified Jeff Atkinson was the parent who stayed home to take care of the children, that he "was like the father and the mother at that time because he was there most of the time." She said Jeff Atkinson bathed, fed and played with his daughters and took care of them when they were sick. She also said Janet Atkinson seldom stayed home when the children were ill. She described Janet Atkinson's involvement with her daughters as "playing with dolls." In Shief's opinion, the daughters were closer to their father than their mother.

Dr. Christel Lembke, a child psychiatrist who was the Atkinson's neighbor at the time of the trial, also testified that Jeff Atkinson has served as both mother and father to the children. She said both mothers and fathers are capable of nurturing young children. Dr. Lembke said Jeff Atkinson, as a father, was always available, very understanding and patient, and was able to spend time with his children in a very constructive way.

Other neighbors also described Jeff Atkinson as spending a great deal of time with his daughters and having a warm and loving relationship with them.

Two of Tara's elementary school teachers testified on behalf of Jeff Atkinson. Both said Jeff Atkinson helped in the classroom and went on his daughter's field trips. Susan Rankin, Tara's first grade teacher, said Jeff Atkinson was a thoughtful, caring and interested parent when he was in her classroom. Kate Shapiro, Tara's second grade teacher, said the children in the classroom related well to Jeff Atkinson. Both teachers testi-

fied that their primary parental contact was with Jeff Atkinson.

Jeff Atkinson testified that from the time his daughters were born until the present he, rather than Janet Atkinson, took care of raising the children. He estimated that he took care of the girls at least two-thirds of the time and Janet Atkinson took care of them one-third of the time. He also said he did most of the meal preparations, grocery shopping, household errands and hiring of housekeepers and that he took the children to most of their doctor appointments.

During law school Jeff Atkinson said he came home between 3 and 4 p.m. most days while Janet Atkinson stayed late at school or engaged in other activities two to five nights per week. He also said that if his work demanded too much time away from his children he would seek a less time consuming job.

Two of Janet Atkinson's friends testified for her. Mary Ann Wexler had known the parties for six years. From 1972 to 1974 the Wexlers lived in the same apartment building as Jeff and Janet Atkinson. The Wexler's primary relationship was with Janet Atkinson rather than Jeff Atkinson. Wexler said she thought Janet Atkinson was "a terrific mother" and that Janet Atkinson had no deficiencies in that role. She also said that Jeff Atkinson cared about his daughters a great deal and that the girls love him.

Carolyn Stock met Janet Atkinson in college 11 years prior to the trial. She said that Janet Atkinson is a caring, nuturing, warm and empathic mother. Jeff Atkinson is an active father but Stock believed he was too involved with his children; he does not give them enough independence.

Janet Atkinson's employer, a partner at her law firm, said she would be allowed to work part-time in her job.

On her own behalf Janet Atkinson testified that she was a fit parent, that she loved her children, and that

they loved her. She acknowledged that Jeff Atkinson was a good father and that he was genuinely interested in his daughters' education. She said she planned to continue working and that she would employ a housekeeper to take care of the children.

The parties' then current housekeeper, Catherine Smith, testified that she had been working for the parties for slightly more than one year. She said that neither party was deficient as a parent and that both were "nice" parents. She said Jeff Atkinson had "a beautiful relationship with the children." Smith also said Jeff Atkinson generally came home from work before Janet Atkinson and that she left the house many evenings without seeing Janet Atkinson.

Upon the motion of the children's counsel, the court appointed an independent medical expert, Dr. Ner Littner. Dr. Littner is a board certified psychiatrist and has written numerous articles on child psychiatry. The witness interviewed the parties and the children and also spoke to other persons who had knowledge of the family. Dr. Littner concluded Janet Atkinson was in relatively good shape emotionally; that she had some problems but had excellent maternal capacity. The psychological tests which were conducted by Dr. Traisman, at Dr. Littner's request, showed the presence of some emotional problems in Janet Atkinson. It also showed she was very interested in her children, has a genuine love for them, and is an adequate parent.

Dr. Littner said Jeff Atkinson also demonstrated some problems although perhaps not as marked as those shown by Janet Atkinson. Jeff Atkinson demonstrated good fatherly capacities. However, in Dr. Littner's opinion, he was trying to be a mother as well as a father to the children. Jeff Atkinson's efforts to be a "mother" were unhealthy. There is a risk that because of his "mothering," the children will grow up being confused about what it means to be a man or a woman. Dr. Littner saw no evidence of harm to or confusion in Tara and Abigail

as a result of Jeff Atkinson's "mothering," but he thought there was a potential for it to develop later. When asked the results of the psychological testing regarding Jeff Atkinson, Dr. Littner responded:

> "It showed the same double situation; namely, the presence of some probems, a strong need for affection and recognition and gratification; feelings of depression; and a sense of loss within him; doubts about his adequacy and about his masculine security and his ability to obtain satisfactions of a lot of internalized angry feelings; and the ability to be a good father."

Dr. Littner appeared before the Academy of Matrimonial Lawyers at a time prior to the trial and there expressed an opinion relative to his belief concerning the custody of young female children. His opinion was that if the mother was truly the "mother" to the children, if she wanted the children, and if she were capable of looking after the children, then her young children are usually better off in her custody. Dr. Littner believes that certain bonds are established between a mother and her daughters during the first year of life where the mother assumes the mothering role, and that the breaking of those bonds in separating the children from their mother causes "a devastating amount of damage." Based on his conclusion that Janet Atkinson was the "basic mother" for the first year of Abigail's and Tara's lives, he believed that breaking those bonds would cause more damage than any positive benefits that could come from living with their father.

Tara was non-committal with Dr. Littner concerning with which parent she preferred to reside, while Abigail was trying to be non-committal but, in Dr. Littner's opinion, "her desire to live with her mother came through quite strikingly." Dr. Littner recommended that Janet Atkinson have custody of the children with liberal visitation rights for Jeff Atkinson.

Dr. Melvin Seglin, a board certified psychiatrist, testified for Jeff Atkinson. Prior to testifying, Dr. Seglin interviewed Jeff Atkinson and the two daughters. He also reviewed the transcripts from the previous days of trial and the psychological reports on the parties. Janet Atkinson was not willing to talk to him.

Dr. Seglin testified that both girls expressed a preference to live with their father. However, Tara was reluctant to make a choice and Dr. Seglin felt that anything Abigail would say was unreliable because of her lack of maturity. He also said that Jeff Atkinson was sensitive, well-adjusted, in good control and, on the basis of the psychologist's written reports, more stable than Janet Atkinson. He concluded that the best interests of the children would be served by placing them in their father's custody.

Dr. Seglin commented on Dr. Littner's opinion that there was something unhealthy about a father assuming too much of a "mother's" role. He said Dr. Littner was applying a classical approach which was common in Sigmund Freud's era 80 years ago when the roles of mother and father were clearly delineated. Dr. Seglin said times have changed and that roles which were appropriate in earlier times are no longer applicable; there is now an interchangeability of roles.

The trial judge, in rendering his decision, commented that there were three factors which he might consider but that none was conclusive: (1) the amount of time each parent spent with the childen; (2) the desires of the children; and (3) comments by the expert witnesses.

Jeff Atkinson makes a number of arguments on appeal concerning the custody order. He argues (1) the trial court erred by failing to make findings of fact as required by the Marriage and Dissolution of Marriage Act (Marriage Act), (2) the trial court abused its discretion and made an error of law by awarding custody to Janet Atkinson, and (3) the custody order denied him due process and equal protection of the law under the Illinois and United States Constitutions.

In arguing that the court erred by failing to make findings of fact, Jeff Atkinson relies on section 602(a) of the Marriage Act which provides:

> The court shall determine custody in accordance with the best interest of the child. The court *shall consider all revelant factors* including:
>
> (1) the wishes of the child's parent or parents as to his custody;
>
> (2) the wishes of the child as to his custodian;
>
> (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
>
> (4) the child's adjustment to his home, school and community; and
>
> (5) the mental and physical health of all individuals involved."

(Ill.Rev.Stat. 1977, ch. 40, par. 602(a).) (Emphasis added.) Jeff Atkinson relies on *Wurm* v. *Wurm* (1979), 68 Ill. App.3d 168, 24 Ill.Dec. 753, 385 N.E.2d 894, where the appellate court remanded the cause to the trial court because the judgment order was silent concerning the section 602 factors. In a more recent case, *Melear* v. *Melear*, (1979), 76 Ill. App.3d 706, 32 Ill.Dec. 261, 395 N.E.2d 208, the appellate court distinguished *Wurm* and concluded:

> "We do not read either *Wurm* or the new Marriage Act as mandating a recital of the specified factors in the judgment order or as requiring written findings of fact in any other form. (Citations.) What section 602 of the Act clearly *does* require is some indication in the record that the trial court considered the factors listed. (*Melear* at 708 09, 32 Ill.Dec. at 260, 395 N.E. 2d at 210.) (Emphasis in original.)

The supreme court recently considered the necessity of findings of fact in the modification of custody judg-

ments under section 610(b) of the Marriage Act. (Ill.Rev. Stat.1977, ch. 40, par. 610(b).) That section provides that a custody judgment shall not be modified unless the court "*finds*" that certain conditions exist. In *In re Custody of Harne* (1979), 77 Ill.2d 414, 33 Ill.Dec. 110, 396 N.E.2d 499, the supreme court found that explicit findings by the court are not only of aid to an appellate court but are "indispensable requirements" of section 60(b). (*Harne* at 420, 33 Ill.Dec. at 112, 396 N.E.2d at 501.) The court also noted that little discretion remains in the trial court when acting on a petition for modification of custody. 77 Ill.2d at 421, 33 Ill.Dec. at 113, 396 N.E.2d at 502.

[2] Section 602, unlike section 610(b), does not require the trial court to make findings; rather, the court is directed to "consider all relevant factors" including certain specified ones. Under section 610(b) the fulfillment of a single condition could suffice to justify a change in custody, whereas it is unlikely that any single factor would be controlling under section 602. Furthermore, the drafters of the Marriage Act clearly intended trial courts to have a broader range of discretion in making an initial custody determination than in considering a petition for modification of custody. For these reasons, and in accordance with the *Melear* decision, we conclude specific findings of fact are not required under section 602 of the Marriage Act.

Section 602 does, however, require that the record contain sufficient evidence concerning the specified factors, which we have previously quoted in full. At the hearing below, the court heard extensive testimony from the parties, their friends and neighbors, and expert medical witnesses. That testimony included opinions and information concerning each of the factors listed above. The evidence relating to the section 602 factors was more than sufficient for the trial court to make a reasoned decision as to the custody of Tara and Abigail.

Jeff Atkinson next argues the trial court abused its discretion and made an error of law by awarding custody to Janet Atkinson. In making this argument he contends the record demonstrates it is in the best interest of the children that they be in his custody and that the trial court improperly decided the case on the basis of sex, as was demonstrated in the trial judge's comment that his decision might not be the same if he were dealing with two male children.

[3] A decision of the trial court regarding custody will not be disturbed on appeal unless it is contrary to the manifest weight of the evidence or unless it appears that manifest injustice has been done. (*De Franco* v. *De Franco* (1979), 67 Ill.App.3d 760, 24 Ill.Dec. 130, 384 N.E.2d 997.) The presumption favoring the result reached by the trial court is strong and compelling in custody cases because it, rather than the reviewing court, is in a better position to evaluate the credibility of the witnesses and the needs of the children. *Gren* v. *Gren* (1978), 50 Ill. App.3d 624, Ill.Dec. 892, 375 N.E.2d 999.

[4] The witnesses at the hearing were generally unanimous in their opinions concerning the quality parenting provided by both Jeff and Janet Atkinson. It is apparent from the record that both parties are devoted to their daughters and deeply concerned about their welfare. Not a single witness expressed an opinion that either Jeff or Janet Atkinson was an unfit parent. Under these circumstances we affirm the trial court's decision as to custody.

We cannot agree with Jeff Atkinson's contention that the custody decision was decided on the basis of sex or that the decision denied him due process and equal protection by discriminating on the basis of sex. Although the "tender years doctrine," the presumption that young children should be with their mother, is now thought to be of questionable validity (*Jines* v. *Jines* (1978), 63 Ill. App.3d 564, 20 Ill.Dec. 426, 380 N.E.2d 440), this does not mean that the sex of the children should not be one

factor to be considered when making a custody determination. We cannot say that the record demonstrates an improper presumption in favor of an award of custody to the mother of Tara and Abigail. We thus reject this argument.

A separate hearing was conducted concerning the division of marital property, child support and maintenance.

The parties were married in 1968 following their first year of undergraduate college. During most of the marriage the parties were attending school, as undergraduates and then as law students. Janet Atkinson also attended two semesters of study at a business school.

Financial support for the marriage came primarily from monies belonging to Jeff Atkinson which he inherited from his father and grandfather prior to his marriage. Jeff Atkinson paid for all of Janet Atkinson's educational expenses during the marriage with the exception of one-half year of undergraduate education for which Janet Atkinson had a scholarship. Janet Atkinson's total expenses for undergraduate, law and business school amounted to approximately $24,000.

Jeff Atkinson also paid for full-time housekeepers since the parties began law school in 1974. Prior to that time he paid for part-time maids and child care services. These expenses amounted to just over $40,000. Jeff Atkinson testified that he performed more of the homemaker services than Janet Atkinson. He said he spent more time than Janet Atkinson in raising the children and taking care of their daily needs. Jeff Atkinson also testified that he handled the majority of household errands. Janet Atkinson denied these assertions.

The parties' primary marital asset was their home, which was held in joint tenancy. It was purchased in 1974 for $89,000. The current market value of the home was estimated at $140,000. Jeff Atkinson made a $30,000 down payment on the home out of his non-marital inherited assets. He used another $10,000 of his funds to purchase

appliances and carpeting for the home. From 1974, when the home was purchased, until 1979, Jeff Atkinson made the mortgage payments from funds derived primarily from his non-marital assets. The current mortgage balance is about $55,000.

At the beginning of the marriage, Jeff Atkinson's net worth was $1,079,000. Jeff Atkinson testified that at the end of the marriage the value of his assets was $724,000 including the full value of the house. His assets were decreased because of school and household expenses, the purchase of the marital home, and also because of declines in the stock market.

During the first four months following, the judgment of dissolution the parties' joint checking account remained open. Jeff Atkinson made the only deposit of funds to the account during this time. Janet Atkinson made numerous withdrawals from the account during this period despite protests from Jeff Atkinson and his counsel. The withdrawals made by Janet Atkinson totalled $5,567 and were for her personal expenses rather than for the children or home. The account was closed in February of 1979.

At the time of the hearing, Janet Atkinson was working part-time as an attorney for a salary of $15,000. Jeff Atkinson's income from his law firm and from his non-marital assets was $54,000. The children are the beneficiaries of two life insurance policies on the life of Jeff Atkinson with a total value of $70,000.

The court awarded Janet Atkinson rehabilitative maintenance of $350 per month for four months. Janet Atkinson was also awarded all the marital property with the exception of Jeff Atkinson's individual retirement account. Janet Atkinson was awarded the entire interest in the marital home. Jeff Atkinson was ordered to pay $261 per week in child support.

Jeff Atkinson was also ordered to establish a $100,000 trust fund to secure the children's education and support.

The interest and dividends from the securities held in the trust were to be retained in the trust until final distribution to Jeff Atkinson when the youngest child reaches age 23.

Jeff Atkinson appeals from the award of the entire interest in the marital home to Janet Atkinson and from the requirement that he set up a trust fund.

The portion of the order requiring Jeff Atkinson to set up a trust was based upon section 503(d) of the Marriage Act. That section, in its entirety, provides:

> "The court may protect and promote the best interests of the children by setting aside a portion of the jointly or separately held estates of the parties in a separate fund or trust for the support, maintenance, education, and general welfare of any minor, dependent, or incompetent child of the parties." (Ill.Rev. Stat.1977, ch. 40, par. 503(d).)

Both parties have noted that this section of the Marriage Act was patterned after section 307(b) of the Uniform Marriage and Divorce Act which is identical to section 503(d) in all important respects. The Commissioners' Comments to that section state in part:

> "Subsection (b) affords a way to safeguard the interests of the children against the possibility of waste or dissipation of the assets allotted to a particular parent in consideration of being awarded the custody or support of a child or children." (9 U.L.A., Uniform Marriage & Divorce Act, § 307(b), Commissioners' Comments at 144.)

Jeff Atkinson contends his assets were reduced during the course of the marriage not through any "waste" on his part but rather because of the unusual educational expenses which he incurred on behalf of himself and Janet Atkinson and also because of declines in the stock market. Janet Atkinson contends that the depletion of Jeff Atkinson's assets during the marriage indicates a "possibility" of waste or dissipation and that this is all that

is necessary to justify the imposition of a trust for the benefit of the children.

[5] Section 503(d) of the Marriage Act does not explicitly require a showing of waste or dissipation of assets as a condition precedent to an order requiring the imposition of such a trust. Nevertheless, we believe imposition of a section 503(d) trust is inappropriate in the absence of evidence showing some need to protect the interests of the children. *See In re Marriage of Olsher* (1979), 78 Ill.App.3d 627, 34 Ill. Dec. 32, 397 N.E.2d 488.

[6] Although Jeff Atkinson's assets have been reduced, there is no evidence that this was caused by irresponsible actions. Nor was there any evidence to show that Jeff Atkinson would be likely to ignore his daughters' financial needs in the future. The evidence presented below demonstrated that Jeff Atkinson has been a fit, devoted and responsible parent. Under these circumstances we conclude the trial court exceeded the scope of its discretion in ordering the establishment of a trust fund for the benefit of the children. That portion of the judgment below is reversed.

Jeff Atkinson next argues the trial court erred a awarding the entire interest in the marital home to Janet Atkinson.

Section 503(c) of the Marriage Act (Ill.Rev.Stat.1977, ch. 40, par. 503(c)) provides in part "the court shall assign each spouse's non-marital property to that spouse." Non-marital property is defined in section 503(a) as:

> "(1) property acquired by gift, bequest, devise or descent;
>
> (2) property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise or descent; * *." (Ill.Rev.Stat.1977, ch. 40, par. 503(a).)

Janet Atkinson appears to concede that the $40,000 provided by Jeff Atkinson for the down payment on their home and the purchase of furnishings was his non-marital

assets as it was acquired by him, prior to the marriage, through inheritance.

[7] The question then is whether the $40,000 retained its character as a non-marital asset when title to the house in which it was invested was put into both parties' names as joint tenants. Jeff Atkinson argues the $40,000, when used for the purchase of the house, became "property acquired * * * in exchange for property acquired by gift, bequest, devise or descent" and thus remained non-marital property. While this assertion would be true if title to the home had been taken in Jeff Atkinson's name alone, we believe he is overlooking the significance of title being in joint tenancy.

The general common law rule is that property taken in joint tenancy with one's spouse raises a presumption that a gift is being made of a one-half interest, even where all the purchase money is supplied by one spouse. *Peck* v. *Peck* (1959), 16 Ill.2d 268, 157 N.E.2d 249; *Bellow* v. *Bellow* (1976), 40 Ill.App.3d 442, 352 N.E.2d 427.

The Marriage Act does not expressly or, in our opinion, inferentially, reject this common law rule. We believe the common law presumption of gift continues to apply to this situation. When the marital home was purchased with Jeff Atkinson's non-marital funds and title was taken with Janet Atkinson in joint tenancy, the $40,000 was transmuted into marital property. No evidence was presented by Jeff Atkinson which would rebut the presumption of a gift.

The court in *In re Marriage of Key* (1979, 71 Ill.App. 3d 722, 27 Ill.Dec. 732, 389 N.E.2d 963, and in *In re Marriage of Dietz* (1979), 76 Ill.App.3d 1029, 395 N.E.2d 762, reached contrary conclusions in cases involving substantially similar issues. *But see Klingberg* v. *Klingberg* (1979), 68 Ill.App.3d 513, 25 Ill.Dec. 246, 386 N.E.2d 517, where the court concluded the commingling of marital and non-marital funds in a joint bank account evinced an intent to have the non-marital monies treated as part of

the marital estate. *See also, Conrad* v. *Bowers* (Mo.Ct. Apps. 1975), 533 S.W.2d 614, and *In re Marriage of Killgore* (Colo.Ct.Apps.1974), 532 P.2d 386, where courts in other jurisdictions, interpreting similar statutes, have reached conclusions in accordance with ours.

Jeff Atkinson's next argument, that an award of virtually all the marital property to Janet Atkinson was not a just division, must be considered in light of our conclusion that the $40,000 for the house and furnishings was transmuted into marital property. The house was the parties' only significant marital asset.

Section 503(c) of the Marriage Act (Ill.Rev.Stat.1977, ch. 40, par. 503(c)) requires the trial court to divide the marital property "in just proportions," considering all relevant factors. The statute lists ten different factors which are to be considered. Those which seem particularly relevant to this case are: the contribution or dissipation of each party to the marital and non-marital property, the value of the property set apart to each spouse, relevant economic circumstances of each spouse, amount and sources of income of each party, custodial provisions for any children, and the opportunity of each party for future acquisition of capital assets and income.

[8, 9] There is no requirement that marital property be divided in *equal* proportions. (*Stallings* v. *Stallings* (1979) 75 Ill.App.3d 96, 30 Ill.Dec. 718, 393 N.E.2d 1065; *Schubert* v. *Schubert* (1978), 66 Ill.App.3d 29, 22 Ill.Dec. 790, 383, N.E.2d 266.) Jeff Atkinson's substantial contribution to the acquisition of the marital home is recognized under section 503(c). Other factors, however, weigh in favor of Janet Atkinson. The statute requires the court to consider the "value of the property set [aside] to each spouse." (Ill.Rev.Stat.1977, ch. 40, par. 503(c)(2).) Therefore, Jeff Atkinson's substantial non-marital assets are relevant to the division of the marital property. The marital home, which was awarded to Janet Atkinson, was valued at approximately $140,000 with an outstanding mortgage of $55,000. Jeff Atkinson's annual income

from his non-marital assets is approximately $27,800 and his salary from his law firm is $26,000. Janet Atkinson's salary for her part-time work at a law firm is $15,000. By virtue of Jeff Atkinson's full time employment and substantial assets, his opportunity for future acquisition of capital assets and income appears greater than that of Janet Atkinson. Under these circumstances, we conclude the trial court acted within the scope of its discretion in awarding virtually all of the marital property to Janet Atkinson.

[10] Jeff Atkinson's final argument is that funds withdrawn by Janet Atkinson from a joint checking account subsequent to the judgment of dissolution were his non-marital funds and should have been returned to him.

This argument overlooks the fact that the bank account was held in joint tenancy. The judgment of dissolution did not affect the parties' joint tenant interests in the account. Each joint tenant possesses a present estate in the assets comprising the joint tenancy. (*In re Estate of Taggart* (1973), 15 Ill.App.3d 1079, 305 N.E.2d 301). Therefore, Janet Atkinson had the right to withdraw funds from that account even assuming that the only deposits were made by Jeff Atkinson during the period in question.

For the foregoing reasons the judgment of the circuit court is affirmed in part and reversed in part.

Affirmed in part, reversed in part.

JOHNSON and ROMITI, J.J., concur.

F. Decision of the Illinois Supreme Court.

SUPREME COURT OF ILLINOIS

No. 53395

87 Ill. 2d 174
— N.E. 2d —

JOHN F. ATKINSON
(a/k/a JEFF ATKINSON),

appellant,

vs.

JANET ATKINSON
(a/k/a JANET GOELZ),

appellee.

Opinion Filed Nov. 13, 1981

Rehearing denied Nov. 25, 1981

MR. JUSTICE CLARK delivered the opinion of the court:

The marriage of John F. Atkinson (Jeff) and Janet R. Atkinson (Janet) was dissolved by the circuit court of Cook County on October 5, 1978. On January 25, 1979, the trial court awarded custody of the two daughters, ages 8 and 6, to Janet with liberal visitation to Jeff and reserved the question of specific visitation, child support, property division, and assessment of fees and costs. Jeff filed an appeal from this order on February 13, 1979, specifying the issue of custody.* On March 26, 1979, the court awarded the marital home to Janet and made certain dispositions of property. On June 13, 1979, the court issued a supplemental judgment order which, *inter alia*,

* [Petitioner's note]: The original opinion of the Illinois Supreme Court did not contain this sentence. After denying the petition for Rehearing and after being advised that appeal was being taken, the court modified its opinion to acknowledge that a notice of appeal was filed from the custody decision.

provided for certain disposition of property, child support and visitation, rehabilitative maintenance, and fees and costs. On July 12, 1979 Jeff filed a second notice of appeal complaining of two provisions of the supplemental judgment.

On March 20, 1980, the Appellate Court for the First District affirmed the award of custody and stated the circuit court decision was not decided on the basis of sex and the record did not demonstrate an improper presumption in favor of the mother. The appellate court also affirmed the award of the marital home to Janet, *inter alia,* but reversed that part of the circuit court's judgment requiring the establishment of a trust fund for the benefit of the children. (82 Ill. App. 3d 617). We granted Jeff Atkinson's petition for leave to appeal.

We initially consider Janet Atkinson's contention that this court lacks jurisdiction to entertain Jeff's appeal from the circuit court's order awarding custody on January 25, 1979. She argues that the custody order was not final and appealable, and Jeff is therefore precluded from raising the custody issue on appeal.

Under Supreme Court Rule 304(a) 73 Ill. 2d R.304(a)), where multiple claims for relief are involved in an action, an appeal from a final judgment as to less than all of the claims may only be taken if the trial court has made an express written finding that there is "no just reason for delaying enforcement or appeal." No such finding was made here. Thus, the custody order was not a judgment from which an immediate appeal could be taken.

> "The provisions of our rule were aimed at discouraging piecemeal appeals in the absence of some compelling reason and at removing the uncertainty as to the appealability of a judgment which was entered on less than all of the matters in controversy." *In re Marriage of Lentz* (1980), 79 Ill.2d 400, 407.

See Davis v. *Childers* (1965), 33 Ill. 2d 297,300.

The order entered January 25, 1979, awarding custody to Janet was not a final order subject to the right of appeal. It did not contain the required Rule 304(a) findings. *White Way Sign & Maintenance Co.* v. *Seltzer Pontiac, Inc.*, (1974), 56 Ill.2d 342, 345.

Rule 303(c) (2) (73 Ill. 2d R. 303(c)(2)) requires the appellant to "specify the judgment or part thereof appealed from." In the notice of appeal dated July 12, 1979, Jeff asked for a review of two provisions in the supplemental judgment order of June 13, 1979, concerning the interest in the marital home and the establishment of a trust fund for the children. The notice of appeal is expressly limited to these matters. Jeff failed to specify that he was appealing the award of custody in his July 12, 1979, notice of appeal. Therefore we conclude that the appellate court lacked jurisdiction to review the custody award. (*See People* v. *Lowe* (1975), 30 Ill. App. 3d 49, 51; *Wells* v. *Kern* (1975), 25 Ill. App.3d 93, 99; *People* v. *Harvey* (1972), 5 Ill. App. 3d 499, 502, *cert. denied* (1973), 410 U.S. 983, 36 L. Ed. 2d 179, 93 S. Ct. 1504; *Scheffler* v. *Ringhofer* (1966), 67 Ill. App. 2d 222, 224-25.) The judgment of the appellate court concerning custody is thus vacated and the appeal from the order awarding child custody is dismissed.

We now consider the award of the marital property. The trial court awarded Janet Atkinson all of the marital property (with the exception of Jeff Atkinson's individual retirement account), rehabilitative maintenance of $350 per month for four months, as well as the entire interest in the marital home. Jeff Atkinson was ordered to pay $261 per week in child support, and establish a $100,000 trust fund to secure the children's education and support.

We agree with the appellate court that the trial court exceeded the scope of its discretion in ordering the establishment of a trust fund for the benefit of the children.

The section of the Marriage Act relied upon in establishing the trust section 503(d), which states:

> "The court may protect and promote the best interest of the children by setting aside a portion of the jointly or separately held estates of the parties in a separate fund or trust for the support, maintenance, education, and general welfare of any minor, dependent or incompetent child of the parties." (Ill. Rev. Stat. 1977, ch. 40, par.503(d).)

This section of the Marriage Act was patterned after section 307(b) of the Uniform Marriage and Divorce Act. The Uniform Marriage and Divorce Act was drafted by the National Conference of Commissioners on Uniform State Laws, composed of commissioners appointed from each of the States, the District of Columbia and Puerto Rico. The Act was approved by the Conference in 1970, amended in 1971, and again in 1973. (9A Unif. Laws Ann. Ill. 91 (1979).) The Commissioners' Comments to that section state, in part:

> "Subsection (b) affords a way to safeguard the interests of the children against the possibility of the waste or dissipation of the assets allotted to a particular parent in consideration of being awarded the custody or support of a child or children." (9A Unif. Laws Ann., Commissioners' Comments, at 144 (1979).)

We concur in the appellate court's assessment that the imposition of a section 503(d) trust is "inappropriate in the absence of evidence showing some need to protect the interests of the children" (82 Ill. App. 3d 617, 627) and therefore inappropriately applied to a responsible parent.

Jeff Atkinson also contends that the award of the marital home to the wife was erroneous. The parties agree that the marital home was purchased with Jeff's nonmarital funds ($40,000) and title was taken with Janet Atkinson in joint tenancy. From the time the property was put into both parties' names as joint tenants, it is presumed to be marital property despite the fact that one

spouse has furnished all of the consideration out of non-marital funds (*In re Marriage of Rogers* (1981), 85 Ill. 2d 217, 223).

Section 503(c) of the Marriage Act (Ill. Rev. Stat. 1977, ch. 40, par. 503(c)) requires the trial court to decide the marital property "in just proportions considering all relevant factors, including:

"(1) [T]he contribution or dissipation of each party in the acquisition, preservation, or depreciation or appreciation in value, of the marital and non-marital property, including the contribution of a spouse or a homemaker or to the family unit;

(2) the value of the property set apart to each spouse;

(3) the duration of the marriage;

(4) *the relevant economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home, or the right to live therein for reasonable periods, to the spouse having custody of the children*;

(5) any obligations and rights arising from a prior marriage of either party;

(6) any antenuptial agreement of the parties;

(7) the age, health, station, occupation, *amount and sources of income*, vocational skills, employability, estate, liabilities, *and needs of each of the parties;*

(8) *the custodial provisions for any children;*

(9) whether the apportionment is in lieu of or in addition to maintenance; and

(10) the reasonable opportunity of each spouse for future acquisition of capital assets and income." (Emphasis added.) Ill. Rev. Stat. 1977, ch. 40, pars. 503(c) (1) through 503(c) (10).)

Under section 503(c), Jeff's contribution is recognized. Other factors under the preceeding section weigh in favor of Janet Atkinson. The marital home was valued at $140,000 with an outstanding mortgage of $55,000. Janet Atkinson's annual salary for her part-time work was $15,000. Jeff Atkinson's annual income from his employment was $26,000. His annual income from his nonmarital assets is about $27,800. Jeff's economic circumstances, including his opportunity to acquire assets and income, were superior. The result was not incompatible under the circumstances. The trial court acted within the scope of its discretion in awarding almost all of the marital property to Janet. (*See In re Marriage of Aschwanden* (1980), 82 Ill. 2d 31, 36-38.) Both parties also agree that, given the familiarity with the home environment, proximity to school, and nearness of the children's neighborhood friends, it is in the children's best interest to remain in the marital home.

Finally, Jeff Atkinson contends that he is entitled to a refund of $5,567.71 which Janet withdrew from the joint checking account after the judgment for dissolution was entered. Jeff had made the only deposits to the account and he made them after the dissolution. Jeff's argument that the money came from his nonmarital funds and therefore should be returned, overlooks the fact that the bank account was held in joint tenancy. It is well established that each joint tenant possesses a present estate in the assets comprising the joint tenancy. (*Kane* v. *Johnson* (1947), 397 Ill. 112.) The judgment of dissolution did not affect the parties' joint interest in that joint bank account. Janet did make a number of withdrawals for her own personal expenses. While Jeff protested frequently at the amount of money Janet was spending, he never sought to prevent Janet from using the account. There is no indication that the parties agreed the money from the joint account was to be used only for the maintenance of the home and care of the children. We agree with the appellate court that Janet had the right to withdraw funds from the account, de-

spite the fact that the deposits to the account were made by Jeff. Accordingly, we affirm that part of the appellate court decision.

That part of the judgment of the appellate court reversing the judgment of the trial court as to establishment of a trust fund and affirming the circuit court's division of property is therefore affirmed. That part of the appellate court judgment which affirmed the trial court as to custody is vacated and the appeal from the custody order is dismissed.

Affirmed in part and vacated
in part appeal dismissed in part.

APPENDIX B

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

United States Constitution, Amendment IX:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

United States Constitution, Amendment XIV, §1:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ill. Rev. Stat. ch. 40, §503:

> (a) For purposes of this Act, "marital property" means all property acquired by either spouse subsequent to the marriage, except the following, which is known as "non-marital property":
>
> (1) property acquired by gift, bequest, devise or descent;
>
> (2) property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise or descent;
>
> (3) property acquired by a spouse after a judgment of legal separation;
>
> (4) property excluded by valid agreement of the parties;
>
> (5) the increase in value of property acquired before the marriage; and
>
> (6) property acquired before the marriage.

(b) All property acquired by either spouse after the marriage and before a judgment of dissolution of marriage or declaration of invalidity of marriage is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, or community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (a) of this Section.

(c) In a proceeding for dissolution of marriage or declaration of invalidity of marriage, or in a proceeding for disposition of property following dissolution of marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's non-marital property to that spouse. It also shall divide the marital property without regard to marital misconduct in just proportions considering al relevant factors including:

(1) the contribution or dissipation of each party in the acquisition, preservation, or depreciation or appreciation in value, of the marital and non-marital property, including the contribution of a spouse as a homemaker or to the family unit;

(2) the value of the property set apart to each spouse;

(3) the duration of the marriage;

(4) the relevant economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home, or the right to live therein for reasonable periods, to the spouse having custody of the children;

(5) any obligations and rights arising from a prior marriage of either party;

(6) any antenuptial agreement of the parties;

(7) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties;

(8) the custodial provisions for any children;

(9) whether the apportionment is in lieu of or in addition to maintenance; and

(10) the reasonable opportunity of each spouse for future acquisition of capital assets and income.

Ill. Rev. Stat. ch. 40, §602 (1977):

(a) The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

(1) the wishes of the child's parent or parents as to his custody;

(2) the wishes of the child as to his custodian;

(3) the interaction and interrelationship of the child with his parent or parents, his siblings and and any other person who may significantly affect the child's best interest;

(4) the child's adjustment to his home, school and community; and

(5) the mental and physical health of all individuals involved.

(b) The court shall not consider conduct of a present or proposed custodian that does not affect his relationship to the child.

Ill. Rev. Stat. ch. 40, §606(a):

Custody proceedings shall receive priority in being set for hearing.

Ill. Rev. Stat. ch. 110, §4 (Civil Practice Act):

This Act shall be liberally construed, to the end that controversies may be speedily and finally de-

termined according to the substantive rights of the parties. The rule that statutes in derogation of the common law must be strictly construed does not apply to this Act or to the rules made pursuant thereto.

No statute hereafter enacted shall be construed to limit or affect the provisions of this Act or the rules adopted in accordance herewith, unless expressly declared to supersede or take precedence of designated provisions thereof or designated rules adopted pursuant thereto.

Ill. Rev. Stat. ch. 110A, § 2 (Illinois Supreme Court Rules):

These rules are to be construed in accordance with the appropriate provisions of An Act to Revise the Law in Relation to the Construction of Statutes, approved March 5, 1874, as amended (Ill.Rev.Stat., ch. 131, § 1 et seq.), and in accordance with the standards stated in section 4 of the Civil Practice Act (Ill.Rev.Stat., ch. 110, §4).

Ill. Rev. Stat. ch. 110A, § 304:

(a) If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying enforcement or appeal. Such a finding may be made at the time of the entry of the judgment or thereafter on the court's own motion or on motion of any party. The time for filing the notice of appeal shall run from the entry of the required finding. In the absence of such a finding, any judgment that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before the entry of a judgment adjudicating all the claims, rights, and liabilities of all the parties.

(b) Judgments and Orders Appealable Without Special Finding. The following judgments and orders are appealable without the finding required for appeals under paragraph (a) of this rule:

(1) A judgment or order entered in the administration of an estate, guardianship, conservatorship, or similar proceeding which finally determines a right or status of a party.

* * *

APPENDIX C

REPORTS OF DR. ROBERT TRAISMAN

A. Report on Jeff Atkinson (Respondent's Exhibit No. 3):

ROBERT N. TRAISMAN, PH. D
Clinical Psychologist
Old Orchard Professional Building
Skokie, Illinois 60076
Phone, Orchard 6-3420

November 11, 1978

Name:	Jeff Atkinson	Tests Administered:
Birthdate:	11/12/48	Rorschach Ink Blot Test
Tested:	11/7/78	Draw-A-Person Test
C.A.:	29-11	Thematic Apperception Test

BEHAVIOR

Mr. Atkinson came by himself to the appointment and readily accompanied the examiner into the testing room. He presents himself as a nice looking gentleman who wears glasses and was neatly dressed on the day of testing. He was extremely cooperative and productive during the evaluation. At the completion of testing when asked what he wanted the most, he stated, "to be happy, to be with my kids and watch them grow up and be independent, happy people." When asked his greatest fear, he stated, "probably the flip side of that, that Janet got the kids and then tried to move out of state with them and interacted with them in a way that would stifle them. Not feel free to be themselves, and they would grow up with hangups about themselves and others."

TEST RESULTS

The Projective Personality Tests indicate Mr. Atkinson to be an extremely bright man who reflects ego resources in the areas of being able to make appropriate object relationships in his environment and in being able to empathize with the feelings and attitudes of other people. He approaches day-to-day situations in an orderly and compulsive manner, but not compulsive to the point of ego constriction or inhibition of function. He obviously is a perceptive and sensitive man who appears to have a good deal of emotional warmth and reflects the ability to express this in an overt fashion. He responds to the Rorschach in an almost continuous free associative manner. His responses were rapid, and free-floating, but they were organized. He certainly indicates a degree of spontaneity that is most refreshing.

Within the TAT he expresses themes dealing with men and women who have tension (this is noted in the Rorschach as well) between them, and consciously verbalizes his personal feelings relative to his divorce. However, he also reflects feelings that both partners (he and his wife) will probably feel better for the divorce. To the blank card of the TAT he pictured himself in three different locations, namely between the building that he works in, the Federal Office Building, and his home. He verbalizes an attempt to balance between his job and taking care of the children. He completes the story by saying, "in the future I see myself at my house with the kids, a wife at some point, working for the Federal Government, stopping off to play racquet ball, coming home, fixing dinner, reading, going to bed and getting a good night sleep." To Card 14, depicting a figure in shadows by an open window, he expresses a personal experience when he had his children this summer and they went to San Francisco, and then up to the Sierra Nevada mountains and hiked and shared a cabin.

Throughout the projective protocol, he reflects very intense feelings for a unified family setting, wherein children receive the warmth and support as well as encouragement for independency from parent figures. To the father-son card of the TAT he became emotional, broke into tears, and apologized, talking about a father-son relationship where the father died as in his own case when he was twelve years old. He states, "the son is looking out, going through a tough time and he would have wished that he had someone from his past like his father (tears, deep sigh). The past is the son is looking for someone to lean on, talk to, congers up some of the good old times. The current scene is the son talking to his father and feeling the warmth and caring, but also the sense of loss. He's feeling like something was missed, a relationship that could have been better as the years went on. The future, there are new beginnings, things go on as for me. I've got my friends, my kids, and they are satisfying, but still there's a lack of roots going back."

The immediately above mentioned theme is obviously reflective of a man who did lose a close relationship with a father figure, as he was entering a significant point in his own psychosexual development (adolescence). Material from the Rorschach reflects strong needs for affection and recognition, and gratification. At points he reflects feelings of depletion wherein he gets depressed, and the depression focuses on unconscious feelings that he really doesn't have anyone that can offer him an affectionate response, and/or that he can obtain some support from. There is evidence to indicate a man who may have been giving a great deal, struggling in an avenue of expressing independent function. At the present time he certainly maintains ego integration, but there is a sense of loss within him, and there are doubts at times deep within the unconscious about his own ad-

equacy, masculine security, and/or ability to obtain positive satisfactions in life. His responses to the Rorschach reflect a good deal of inner tension with concomitant internalization of hostile, angry feelings. He certainly indicates some rather strong negative feelings toward his ex-wife in the sense of his feeling that she has not gratified him, and/or contributed to the emotional and physical well-being of himself and the children. It is interesting that to Card 7 of the Rorschach he personalizes to the dark center area of the card wherein he sees people with tension, "there's a distance, they're looking at each other like my ex-wife and me. A sense of static, two people either glaring at each other and not doing anything about it, a portrayal of what was with us for awhile."

On the basis of the psychological study, it is the examiner's opinion that one is dealing here with a very bright and sensitive man who reflects ego resources in the areas of being able to empathize with the feelings and attitudes of others, express emotion, and offer appropriate amounts of affection and encouragement to others. He, himself, indicates some ego depletion relative to unresolved dependency needs, depression, inner tension and anger. At the same time he appears able to spontaneously express himself, and the expression seems to be in a manner wherein he is free of essential anxiety over what others might interpret. That is to say he is really not very defensive about expressing his own personal attitudes, ideas and beliefs on matters, and certainly seems at the present time to have strong needs to help others, at points in an almost idealistic manner. At the present time he certainly appears to have the ego integration and strength necessary to offer his children a stablized, masculine father image as well as offering them the appropriate amount of love, discipline, and encouragement for independent growth. His feelings of loss relative to his

marriage, past loss of father at a crucial time in his life, and his own struggle for growth might require psychotherapeutic aid so that he gets a better understanding into himself and can resolve past frustrations and discouragements.

/s/ Robert N. Traisman, Ph.D.
Robert N. Traisman, Ph.D.

RNT/mra

B. Report on Janet Atkinson (Goelz) (Petitioner's Exhibit No. 6)

ROBERT N. TRAISMAN, Ph.D.
Clinical Psychologist
Old Orchard Professional Building
Skokie, Illinois 60076
Phone ORchard 6-3420

November 11, 1978

Name:	Janet Goelz	Tests Administered:
Birthdate:	8/25/49	Rorschach Ink Blot Test
Tested:	11/7/78	Draw-A-Person Test
C.A.:	29-3	Thematic Apperception Test

BEHAVIOR

Ms. Goelz came by herself to the appointment and readily accompanied the examiner into the testing room. She presents herself as a tall, thin, attractive young woman. She was cooperative during the testing, and extremely productive, beyond the expected. The Rorschach itself took over two hours, and she offered an unusual number of responses.

TEST RESULTS

After the first card of the Rorschach was presented, and she responded with a percept of x-ray, and then cockroach, she stated, "this whole thing is strange. I'm scared, I'm literally terrified now, I don't know about what they mean, I'm convinced you think they're important (meaning the Rorschach) and there are folks judging. This is all like magic to me, I feel you're going to judge me and find out if I'm good or bad and I can lose my children from it." At this point the testing was stopped, the examiner took the time to explain the procedure and to attempt to assuage her obvious tension. After a brief time she stated that she was still tense, but that the examiner had made her feel better.

The Projective Personality Tests reflect a very depressed and anxious woman who is markedly suspicious of the motives and intentions of other people. She attempts to deal with everyday situations in a very ritualistic, perfectionistic manner wherein she unconsciously tries to deal with every small detail around her. However, this is basically an impossibility for anyone, and the examiner raises the question relative to how efficient or functional she is in her everyday life situation. She certainly indicates positive concerns about her children, and indicates wishes for a new life for herself, and this is similar to feelings of her ex-husband. It was interesting that to the blank card of the TAT she told a theme of children playing in the leaves with friends, that the mother raked the leaves into piles and didn't bag them because she wanted the children to enjoy jumping in them. She notes, "the mother is standing, smiling, because for awhile the children had trouble making friends and adjusting. Now it's obvious that they are feeling better and can reach out and make friends, and the mother is standing in the sunshine feeling very contented." She verbalized that the thing she wanted the most was, "to have the chaos in my life settled, my life is pretty much in limbo now." Her greatest fear she stated was, "that all the people in the world I love will go away all at once." When asked what people she meant, she stated, "my children, my friends." When asked if she felt that was really possible, she stated, "no, it's not possible, but if it happened I think I'd die (at this point she laughed)."

There is an extremely tenuous quality to the above statement of fear, and there is evidence from the projective material that this lady may well have had severe trauma and loss in her own childhood. Her depression focuses on intense, unconscious feelings that she is unlovable, unacceptable, and really has no one she can lean or rely upon in her day-to-day world. In part this could be reactive to the marital stress and resultant divorce, but it seems more longstanding and deeper than just a

more recent stress event. She indicates many unresolved dependency needs, and a good deal of distrust about her own ability to function in a competitive, aggressive and/or demanding environment. One wonders if she is really able to utilize her very superior intelligence in an integrated and successful manner, either vocationally or even personally. She has some resources within the ego to empathize with the feelings and attitudes of others, and to make appropriate object relationships in her everyday world. However, she manifests a very weak feminine self concept with strong feelings that women oftentimes are oppressed, rejected, and essentially non-gratified.

There is a good deal of competitiveness with males, and the Rorschach reflects many sexual responses, primarily dealing with penises. This is very unusual and might well symbolize either extreme sexual frustration, or deep unconscious needs to incorporate the phallus, possibly in a castrative fashion. One wonders about the degree of mothering she received, as it is interesting that to Card 3 of the Rorschach she sees women with babies in cradles, "they're reaching in to cover the babies up with a blanket, *not to pick up the baby.*" She later associates to the fact that the women are "very sharp, they have pointy noses, pointy knees, pointy heels and pointy breasts, but their arms are soft." It is significant to note that her description is realistic and correct, but the association from covering babies and not picking them up to the "pointy females" could well reflect both her own deprivation as a child in the relationship with her own mother, as well as doubts about how able she is to offer a warm, loving relationship to her children. There is little doubt that on a conscious basis she certainly feels that she can, and the examiner would tend to agree with her. However, her many self doubts and anxieties about life in general as well as herself might dictate that when she is faced with decision-making situations that the decision becomes very ego alien to her.

This is a lady who really wants to be mothered herself and loved and protected, but at the same time seems to be very anxious about what such passivity would mean. There are deep unconscious fears that to be passive and dependent means to be destroyed and/or engulfed, and thus she could well act out and assert herself in an aggressive, independent fashion to maintain her "identity." She certainly perceives men as aggressive, and at points she struggles to almost incorporate and/or identify with them. This might make heterosexual relationships very conflictful for her, from an affectionate standpoint. One response in the Rorschach deals with a "penis and testicles and it looks like smoke is shooting out," while another response is, "a penis with a halo around it and feathers." There are many other responses dealing with penises, a few with vaginas, and as noted earlier there is obvious preoccupation with this. When she was asked to draw a person, her first drawing was of a female in what appears to be bluejeans and a turtleneck sweater. She states that the age is 17, and describes it as, "she's reaching in her pocket for a keychain that has a highpowered whistle on it, like a good luck charm."

Ms. Goelz often tends to perceive "distressed faces," in the Rorschach, tends to very frequently focus on the spaces on the cards as opposed to the major blot material. There is sufficient material to indicate strong negativistic or oppositional tendencies to her, and strong tendencies to, in essence, assume a more tangential involvement or focus on life than really "getting into" deep, interpersonal relationships, emotional interchange, and generalized involvement. At times she unconsciously questions, if not consciously, how stable her environment is, (*this* could be reactive to the divorce-custody stress) and how much influence she really has over her environment and individuals therein. She appears to be struggling very hard to maintain psychic equilibrium in the face of inner as well as external stress.

On the basis of the psychological study, it is the examiner's opinion that this is a very bright, sensitive lady, but she is a woman who is very frightened, depressed, and angry. She reflects a very weak feminine self concept, and at points indicates a very tenuous adjustment to day-to-day stresses. The examiner would recommend psychotherapy for her, initially of an ego defense strengthening type, so that she is able to obtain better insights into past traumas as well as present conflicts. She appears to be very interested in her children. and to have a genuine love for them, but at the same time there are many feelings of distrust about herself in dealing with the demands that children place upon parents. There is no real, strong indication that she would be a markedly unfit mother.

/s/ Robert N. Traisman, Ph.D.
Robert N. Traisman, Ph.D.

RNT/mra

Opposition

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ALEX

No. 81-1382

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JEFF ATKINSON,

Petitioner,

vs.

JANET ATKINSON
(a/k/a JANET GOELZ),

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Illinois

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Illinois Supreme Court is reported at 87 Ill. 2d 174, 57 Ill. Dec. 567, 429 N.E. 2d 465 (1981) and is reproduced in Appendix F of petitioner's petition for writ of certiorari. The opinion of the Illinois Appellate Court, First District, Fourth Division is reported at 82 Ill. App. 3d 617, 37 Ill. Dec. 829, 402 N.E. 2d 831 and is reproduced in Appendix E of petitioner's petition for writ of certiorari.

JURISDICTION

These proceedings were instituted when the respondent Janet Atkinson filed her petition for dissolution of marriage in the Circuit Court of Cook County, Illinois pursuant to the Illinois Marriage and Dissolution of Marriage Act, Ill. Rev. Stat., 1979, Ch. 40, Section 101 *et seq.* During those proceedings the trial court entered orders on January 25, 1979 awarding permanent custody of the two minor children Tara and Abigail Atkinson to their mother, the respondent, and on June 13, 1979 disposing of the marital property. The petitioner-father appealed those judgment orders to the Illinois Appellate Court, First District which affirmed both of the trial court's orders on March 20, 1980 and denied a petition for rehearing on April 15, 1980. The petitioner-father then appealed the opinion and judgment of the First District Appellate Court to the Illinois Supreme Court. On appeal the Illinois Supreme Court in its opinion and judgment dated November 13, 1981, vacated the judgment of the appellate court con-

cerning custody and dismissed the appeal from that order for lack of an appealable order. At the same time it affirmed the disposition of marital property. The Illinois Supreme Court denied the petitioner-father's petition for rehearing on November 25, 1981.

Petitioner has invoked the jurisdiction of this Honorable Court to review the opinion and judgment of the Illinois Supreme Court by virtue of 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

1. Does the opinion and judgment of the Illinois Supreme Court rest upon adequate independent state grounds?

2. Will a review of the Illinois Supreme Court's opinion and judgment by this Court involve only a reexamination of the facts of the case rather than consideration of a substantial federal question?

STATUTES INVOLVED

Ill. Rev. Stat., 1977, Ch. 110A, Section 304(a);
Ill. Rev. Stat., 1977, Ch. 110A, Section 304(b)(1);
Ill. Rev. Stat., 1977, Ch. 40, Section 602(a); and
Ill. Rev. Stat., 1977, Ch. 40, Section 503(c).

The full text of these provisions are set forth in petitioner's Appendix B and in the respondent's brief in opposition where appropriate.

STATEMENT OF THE CASE

It is respondent's contention that the Illinois Supreme Court's determination to dismiss petitioner's appeal from the custody order for want of jurisdiction rests upon adequate independent state grounds. Petitioner failed to appeal from an appealable order and, in addition, failed to file a notice of appeal in conformance with well defined, well established, and well publicized rules of Illinois law. For this reason, an adequate independent state ground exists for the Illinois Supreme Court's determination of the custody question.

Furthermore, both the custody question and the marital property distribution question involve an application of Illinois law to the circumstances of this case. No sex discrimination is involved in either question because no preference based upon sex exists in Illinois law or was applied by the Illinois courts to reach the result obtained in this case. Hence, any review by this Court could only involve a reexamination of the facts of this case and an application of Illinois law to those facts rather than a review of a substantial federal question.

REASONS FOR DENYING THE WRIT

I.

THE OPINION AND JUDGMENT OF THE ILLINOIS SUPREME COURT RESTS UPON ADEQUATE, INDEPENDENT STATE GROUNDS.

It is well settled that the Supreme Court has no jurisdiction to revise the judgments of state courts and must accept as controlling state court decisions on local statutory and common law. *Johnson* v. *State of New Jersey*,

384 U.S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882 (1966), rehearing denied, 385 U.S. 890, 87 S. Ct. 12, 17 L. Ed. 2d 121; *Henry* v. *State of Mississippi,* 379 U.S. 443, 85 S. Ct. 564, 13 L. Ed. 2d 408 (1965); *American Ry. Express Co.* v. *Commonwealth of Kentucky,* 273 U.S. 269, 47 S. Ct. 353, 71 L. Ed. 639 (1927). Furthermore, matters affecting the remedy are governed by the law of the forum and a decision of a state court on a matter of state pleading or practice is not reviewable by the United States Supreme Court. *Central Vermont R. Co.* v. *White,* 238 U.S. 507, 35 S. Ct. 865, 59 L. Ed. 1443 (1915). In this vein, the United States Supreme Court in *Wainwright* v. *Sykes,* 433 U.S. 72, 97 S. Ct. 2497, 53 L Ed. 2d 594 (1977), rehearing denied 434 U.S. 880, 985 S. Ct. 241, 54 L. Ed. 2d 163, held that where a Florida rule required that a confession be challenged by the defendant at the time of trial or not at all, failure to do so would result in an adequate independent state procedural ground which would prevent direct review by the Supreme Court. It is respectfully submitted that there exists here an adequate independent state ground with regard to the Illinois Supreme Court's disposition of the custody question which likewise prevents review by the Supreme Court.

The Illinois Supreme Court vacated the judgment of the appellate court* and dismissed the appeal from the order of the trial court concerning custody because the petitioner failed to appeal from an order which was capable of being appealed and also failed to file a proper notice of

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* It is worthy of note that the appellate court after a full review of the record affirmed the judgment of the trial court that the respondent-mother should have custody of the two minor children.

appeal from the final judgment order in conformance with well established and well accepted rules of Illinois appellate procedure.

The order awarding custody of the two minor children to the respondent-mother was not a final appealable order under Illinois law because it did not dispose of all of the issues in the case and conclude the litigation before the court. *Peter G. Georges, Inc.* v. *Feldon Bldg. Corp.*, 61 Ill. App. 3d 631, 377 N.E. 2d 1102, 1105 (1978); *Mexicali Club, Inc.* v. *Illinois Liquor Control Commission*, 37 Ill. App. 3d 797, 347 N.E. 2d 190 (1976); *Cable* v. *Chicago Health Club, Inc.*, 53 Ill. App. 3d 1019, 369 N.E. 2d 188, 189 (1977). At the time the custody order was entered, there still remained the issue of disposition of the marital property for the trial court's consideration. Pursuant to the Illinois Constitution, Ill. Const. (1970) Article VI § 6, only final judgments which dispose of all the issues in a case are appealable as a matter of right while "other than final judgments" are appealable only by rule created by the Supreme Court.

Supreme Court Rule 304(a), Ill. Rev. Stat., Ch. 110 A, Section 304(a), is such a rule which dictates the terms under which the custody order involved here may be appealed. It provides in essence that any judgment order which fails to dispose of all of the issues in a case and which is otherwise final may be appealed "only if the trial court has made an express written finding that there is no just reason for delaying enforcement or appeal" from the order. When there is a failure to comply with the literal terms of Supreme Court Rule 304(a) the appellate court lacks the power to proceed to a decision on the merits and *must* dismiss the appeal for want of jurisdiction. *Lentz* v. *Lentz*, 73 Ill. App. 3d 93, 391 N.E. 2d 582 (1979) *aff'd.* 79 Ill. 2d 400, 403 N.E. 2d 1036 (1980); *Blan-*

chette v. *Martell,* 52 Ill. App. 3d 1029, 368 N.E. 2d 458 (1977); *Peesel* v. *Peesel,* 11 Ill. App. 3d 76, 296 N.E. 2d 69 (1973); *Petition of Morehead,* 64 Ill. App. 2d 469, 212 N.E. 2d 250 (1965); *McGee* v. *McGee,* 36 Ill. App. 2d 105, 183 N.E. 2d 545 (1962). The custody order in question did not dispose of all the issues in the case; did not include the requisite 304(a) language; hence the Illinois Supreme Court had no choice but to dismiss the appeal before it for want of jurisdiction based upon well settled Illinois law.

It is also well settled Illinois law that failure to specify "the judgment or part thereof appealed from" in a notice of appeal will result in a waiver of any issue concerning that portion of the judgment on appeal. *Illinois Central Gulf R.R. Co.* v. *Sankey Bros.,* 67 Ill. App. 3d 435, 384 N.E. 2d 543 (1978), *People* v. *Harvey,* 5 Ill. App. 3d 499, 285 N.E. 2d 179, 181 (1972); *Lewanski* v. *Lewanski,* 59 Ill. App. 3d 805, 815-16, 375 N.E. 2d 961 (1978). Petitioner's notice of appeal from the final judgment order which disposed of all of the issues in the case failed to specify that petitioner was appealing from the custody disposition previously made by the trial court. Hence, the Illinois Supreme Court could not consider the custody question under this notice of appeal.

In an attempt to avoid his own obvious failure* to comply with well settled Illinois law, petitioner makes various arguments to draw attention away from this fact. First, he says at page 20 of his petition that Illinois law favors

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*It should be pointed out in this regard that petitioner is a capable lawyer and he was represented by prominent divorce specialists throughout the trial and appeal of this cause.

prompt consideration of child custody questions. While this is true, it does not excuse the need to follow time honored principles of Illinois' law concerning the appeal process which petitioner ignored. Second, he says that under Illinois law it is unnecessary to comply with Supreme Court Rule 304(a)'s requirement that the order appealed from contain the "no just reason for delaying enforcement or appeal" language pursuant to a rule exception which permits the appeal of non-final orders enforceable by the contempt process. While the rule exception is accurately stated by petitioner, it has no application here. The best proof of that is that petitioner advanced this theory of appealability to the Illinois Supreme Court which rejected it dismissing petitioner's appeal. Decisions by the court of last resort of a state on matters of state law are controlling with respect to the United States Supreme Court's review of the state court judgment. *Citizen's National Bank* v. *Durr Ohio,* 257 U.S. 99, 42 S.Ct. 15, 66 L.Ed. 149 (1921). Hence, the Illinois Supreme Court's determination that the petitioner's custody appeal did not fit within the specified Illinois exception is determinative of that issue, and that determination cannot be reviewed here. The same may be said for the petitioner's argument at page 21 of his petition that the custody issue is appealable without the Rule 304(a) language pursuant to Supreme Court Rule 304(b)(1) which permits immediate appeal from orders "entered in . . . [a] guardianship, conservatorship, or similar proceeding which finally determines a right or status of a party." This too was presented to the Illinois Supreme Court as a theory of appealability and rejected; hence, it cannot be reviewed by this Court.

Finally, petitioner seems to suggest at pages 23 and 24 of his petition that the Illinois Supreme Court's deter-

mination resulting in the dismissal of his custody appeal is novel and should not be given retrospective application, and that to do so denies him due process of law. First, there is nothing novel about the Illinois Supreme Court's determination to dismiss the petitioner's custody appeal. In fact, the dismissal was predictable and preventable. It was predictable because it was based upon well defined, well established, and well publicized rules of Illinois' law. It was preventable by resort and conformance to those self same rules. There is no denial of due process in the dismissal of the petitioner's custody appeal unless his own carelessness can be said to rise to the dignity of a due process violation. The dismissal of his appeal was simply one in a long line of Illinois decisions which hold that failure to appeal from an appealable order, or failure to file a sufficiently specific notice of appeal in conformity with well established Illinois law will result in the appeal being dismissed for want of jurisdiction.

For the foregoing reasons it is respectfully submitted that this Court should deny the writ because the opinion and judgment of the Illinois Supreme Court rests upon adequate state grounds.

II.

A REVIEW OF THE OPINION AND JUDGMENT OF THE ILLINOIS SUPREME COURT WILL ONLY INVOLVE A REEXAMINATION OF THE FACTS OF THE CASE RATHER THAN CONSIDERATION OF A SUBSTANTIAL FEDERAL QUESTION.

It is well established that the Supreme Court will not exert its jurisdiction merely to review a decision of a state court upon question of fact. *Grayson* v. *Harris,* 267 U.S. 352, 45 S.Ct. 317, 68 L.Ed. 652, (1925). *Portland R. Co.* v.

Railroad Commission, 229 U.S. 397, 33 S.Ct. 820, 57 L.Ed. 1248, (1913); *Fry Roofing Co.* v. *Wood,* 344 U.S. 157, 73 S.Ct. 204, 97 L.Ed. 168 (1952). The only questions presented by the custody and property distribution issues petitioner seeks to develop are fact questions which do not involve any—much less substantial—federal questions.

First, the petitioner seeks to create his federal question on the custody issue by arguing at page 12 of his petition that giving an automatic preference to mothers in custody cases presents an important federal question that should be settled by this Court. Certainly, giving an automatic preference to mothers in custody cases would present a substantial federal question but that is not what happened in the instant case. The respondent mother was not given an automatic preference as custodian of the minor children because of her status as a mother. As a matter of fact, she was given no preference at all.

The Illinois Appellate Court—unlike the Illinois Supreme Court—did review the custody issue on the merits even though it recognized the lack of appealability of the custody order because it felt "the interests of justice" required such review. In its review the Illinois Appellate Court made the following observations:

> "The witnesses at the hearing were generally unanimous in their opinions concerning the quality parenting provided by both Jeff and Janet Atkinson. It is apparent from the record that both parties are devoted to their daughters and deeply concerned about their welfare. Not a single witness expressed an opinion that either Jeff or Janet Atkinson was an unfit parent. Under these circumstances we affirm the trial court's decision as to custody. 402 N.E. 2d at 836.

* * *

> We cannot agree with Jeff Atkinson's contention that the custody decision was decided on the basis of sex or that the decision denied him due process or equal protection by discriminating on the basis of sex. Although the "tender years doctrine", the presumption that young children should be with their mother, is now thought to be of questionable validity (citation omitted) this does not mean that the sex of the children should not be one factor to be considered when making a custody determination. We cannot say that the record demonstrates an improper presumption in favor of an award of custody to the mother of Tara and Abigail. We thus reject this arguement. 402 N.E. 2d at 834.

The foregoing amply demonstrates that the custody question was determined upon the facts—testimony concerning the parents — and no presumption in favor of the mother because of her sex was indulged by any court.

In addition, the custody decision was made after considering the testimony of the witnesses as it relates to certain factors mandated by the Illinois Marriage and Dissolution of Marriage Act, Ill. Rev. Stat., 1977, Ch. 40 Section 602(a) none of which creates a presumption in favor of either parent. The factors to be considered are as follows:

> "The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including: (1) the wishes of the child's parent or parents as to his custody;
>
> (2) the wishes of the child as to his custodian;
>
> (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;

(4) the child's adjustment to his home, school and community; and

(5) the mental and physical health of all individuals involved." (Ill. Rev. Stat., 1977, Ch. 40, par. 602(a).)

It is plain that the custody determination made by the court was based upon Illinois divorce law as applied to the facts of this case without the introduction of any constitutionally impermissible preference in favor of the mother. Review of the custody determination by this Court, therefore, can only involve a reexamination of the facts of this case rather than consideration of a substantial federal question.

The petitioner also seeks to have this Court review the Illinois Supreme Court's affirmance of the trial court's distribution of property by saying that "the award of virtually all marital property to the wife was sex discrimination." (Petitioners' brief p. 18) A review of this determination, too, will only involve a reconsideration of the facts of the case rather than a substantial federal question.

The record in this case and the Illinois Supreme Court's opinion reveals that the primary marital asset was the home which had a fair market value of $140,000, at the time of trial which was subject to a $55,000 mortgage. 429 N.E. 2d at 569. The home was awarded to the respondent mother. In affirming that award the Illinois Supreme Court applied the factors contained in Section 503 of the Illinois Marriage and Divorce Act, Ill. Rev. Stat., 1977, Ch. 40, § 503, which states that the court,

". . . shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors, including:

(1) [T]he contribution or dissipation of each party in the acquisition, preservation, or depreciation or appreciation in value, of the marital and non-marital property, including the contribution of a spouse as a homemaker or to the family unit;

(2) the value of the property set apart to each spouse;

(3) the duration of the marriage;

(4) the relevant economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home, or the right to live therein for reasonable periods, to the spouse having custody of the children;

(5) any obligations and rights arising from a prior marriage of either party;

(6) any antenuptial agreement of the parties;

(7) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties;

(8) the custodial provisions for any children;

(9) whether the apportionment is in lieu of or in addition to maintenance; and

(10) the reasonable opportunity of each spouse for future acquisition of capital assets and income."

Those factors applied to the circumstances that petitioner had three quarters of a million dollars in assets of his own while respondent had none; that petitioner earned approximately $54,000 per year while respondent earned $15,000, and that an award of the marital home to respondent who had custody of the minor children would permit them to maintain friendships and attend the same school, 429 N.E. 2d at 570, 402 N.E. 2d at 835, all militated in favor of affirming the distribution of marital property

made by the trial court. Hence, the distribution of marital property in this case was based upon the economic circumstances of the parties which have nothing to do with their sex and any review of that distribution would only involve a reconsideration of Illinois law as applied to the facts rather than review of a substantial federal question.

For the foregoing reasons, it is respectfully submitted that this Court should deny the writ because review of the opinion and judgment of the Illinois Supreme Court's opinion would only involve reexamination of the facts of the case rather than consideration of a substantial federal question.

CONCLUSION

For all of the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari to review the opinion and judgment of the Illinois Supreme Court in this case should be denied.

Respectfully submitted,

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Petitioner's Reply Brief

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No. 81-1382

In the
Supreme Court of the United States
OCTOBER TERM, 1981

JEFF ATKINSON,
Petitioner,

vs.

JANET ATKINSON
(a/k/a JANET GOELZ),
Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Illinois

PETITIONER'S REPLY BRIEF

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On Petition For Writ Of Certiorari
To The Supreme Court Of Illinois

PETITIONER'S REPLY BRIEF

REASONS FOR ALLOWANCE OF THE WRIT

I.

THIS CASE RAISES THE IMPORTANT FEDERAL QUESTION OF WHETHER IT IS PROPER TO GIVE AN AUTOMATIC PREFERENCE TO MOTHERS IN CHILD CUSTODY PROCEEDINGS.

The respondent concedes that "giving an automatc preference to mothers in custody cases would present a substantial federal question", but then goes on to argue that maternal preferences are not at issue. (Respondent's Brief in Opposition [hereinafter "Br. Opp."] at 10).

Although the respondent correctly notes that the Illinois statutory criteria for deciding child custody does not create an automatic preference for either parent (Br. Opp. at 11-12), the respondent ignores that the words of the trial judge and the record of this case show that the decision was based on sex. The only reason given by the trial judge—and the respondent cites no others—is "We are dealing with two young ladies. . . . I feel they should be in the custody of the mother." (Report of Proceedings, Jan. 25, 40-41). The judge restated his view that custody cases could be decided on the basis of sex when he said, "[P]erhaps in this case if I was dealing with two young men, I don't know if the decision would be the same." (*Id.*) The Illinois Appellate Court discounted the trial judge's comments, but nonetheless held that sex should be considered when making a custody determination. 82 Ill. App. 3d at 625, 402 N.E.2d at 836.

A comparison of the record with the statutory criteria for deciding child custody also shows that this case was decided on the basis of sex. The factors relevant to deciding child custody in this case are: "the wishes of the child as to his custodian"; "the interaction and interrelationship of the child with his parent or parents"; and "the mental and physical health of all individuals involved." Ill. Rev. Stat. ch. 40, §602(a) *reproduced in* Petition for Writ of Certiorari [hereinafter "Pet."] at 34a. The overwhelming weight of evidence —both in quality and quantity— is in favor of the father,[1] yet the deci-

[1] On behalf of the father, there is testimony from four of the Atkinson's neighbors, two of the children's teachers, the housekeeper, two psychiatrists, and the reports of the clinical psychologist. *See* Pet. at 1-4. On behalf of

sion is to the contrary. In truth, this case has not revolved around that evidence, but around the issue of giving mothers an automatic preference in custody proceedings because of sex.

II.

THE ILLINOIS SUPREME COURT DID NOT HAVE ADEQUATE STATE GROUNDS TO REFUSE TO DEAL WITH THE CUSTODY ISSUES AND ITS REFUSAL TO DEAL WITH THE ISSUES DENIED THE PETITIONER DUE PROCESS.

In eight places in respondent's Brief in Opposition, respondent claims that it is "well established", "well defined", "well settled", and "predictable" under Illinois law that petitioner's appeal was not filed in the proper manner and, therefore, the Illinois Supreme Court's decision rests on adequate state grounds. (Br. Op. at 4, 6, 7, and 9). The opposite is true.

Illinois law concerning appeals in family law cases is anything but "well settled."[2] The Illinois Institute for

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[1] (Continued)
the mother, there is testimony from two of her friends, whose perspective is less objective and less close than the father's witnesses, and testimony from a psychiatrist who said it is unhealthy for a father to perform "mothering" functions. *See* Pet. at 3-6.

[2] The fact that Illinois law regarding appeal of custody cases is not well settled is shown by the action of the attorneys for respondent. The attorneys for respondent waited 8½ months after receiving the notice of appeal from the custody decision before they filed their unsuccessful motion in the Illinois Appellate Court to dismiss the custody appeal. If the law were as "well established" and "well publicized" as respondent's attorneys contend, they undoubtedly would have filed their motion to dismiss much earlier.

Continuing Legal Education, a leading publisher and commentator on Illinois law, recently published a manual for lawyers on the subject of appellate procedure in family law cases. The Institute stated:

> "The passage of the Illinois Marriage and Dissolution of Marriage Act (IMDMA), Ill. Rev. Stat., ch. 40, §101 et seq., obviously will be of great consequence to appeals in matrimonial cases.[3] It probably will be many years before we will know all of those consequences. However, we already sense a new air of uncertainty and unpredictability about Illinois matrimonial law which can be expected to manifest itself in the opinions of the higher courts. Specifically, it is virtually impossible to predict whether some precedents (including some cases cited in this chapter) will continue to be applicable under the new Act.
>
> • • •
>
> "Things have not worked out as predicted at all."

Zavett, *Appeals*, 2 Illinois Family Law 1981 at 23-5 & 23-8 (publ. Ill. Inst. Continuing Legal Educ.).

As noted in the Petition for Writ of Certiorari, there were three solid reasons for believing that the custody order was immediately appealable and, furthermore, the Illinois Appellate Court agreed that it had jurisdiction to hear the appeal. (Pet. at 9-10, 20-21).[4]

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[3] The Illinois Marriage and Dissolution of Marriage Act had been in effect for less then five months at the time the notice of appeal was filed from the custody decision.

[4] If the petitioner had not taken his appeal from the custody decision when he did, he might have been precluded from taking any appeal from that decision because Illinois law requires that the notice of appeal be filed within 30 days of judgment. Ill. Rev. Stat. ch 110A, § 303.

While admitting that the petitioner correctly stated the rules regarding what orders are appealable, respondent argues that the Illinois Supreme Court's refusal to consider the appeal precludes review by this Court. (Br. Opp. at 8-9). But the respondent ignores the basic principle, declared by Justice Holmes, that: "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis* v. *Wechsler,* 263 U.S. 22, 24, 44 S.Ct. 13, 14, 68 L.Ed. 143, 145 (1923). *See also* Pet. at 22-26.

After having this case on its docket for 1 ½ years, the Illinois Supreme Court dismissed the custody appeal with three paragraphs of its opinion. The court did not explain why the custody appeal was not appealable under the three bases argued by the petitioner or why the court was departing from more than 40 years of its own case law on construing notices of appeal. *See* Pet. at 22-23. The decision below appears not to rest on an interpretation of Illinois law, but rather upon an improper refusal to address the true issue, that of maternal preferences in child custody cases.

CONCLUSION

The issue of whether child custody cases can be decided on the basis of sex is of vital importance to children and parents across the country. This case has squarely presented the constitutional issues—both to the Illinois Supreme Court and to this Court. We ask that the Petition for Writ of Certiorari be granted for a plenary review of this case.

Respectfully submitted,

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